No. 7099

United States
Circuit Court of Appeals
For the Ninth Circuit

IN THE MATTER OF SECURITY BUILDING & LOAN ASSOCIATION, a corporation,
Alleged Bankrupt,
SECURITY BUILDING & LOAN ASSOCIATION, a corporation,
Appellant,
vs.
JOHN H. SPURLOCK, et al,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLANTS

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Attorney for Appellant
Security Building & Loan
Association, a corporation.
ALEXANDER B. BAKER,
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Ben H. Dodt, State Court
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STATEMENT OF THE CASE

(In this brief all figures appearing in parentheses refer to pages in the printed Transcript of Record. Security Building & Loan Association, a corporation, is in this brief referred to, for brevity's sake, as "Association.")

This is a bankruptcy case instituted by John H. Spurlock, Ted Dempsey and W. L. Selman by the

filing of an involuntary petition in bankrutcy in the United States District Court for the District of Arizona on the 5th day of January, 1932 (1-6).

These petitioning creditors with leave of court on February 1, 1932, filed an amended involuntary petition (23-28). On January 21, 1932, after an order of the court authorizing them so to do, Mary Rose, Ray L. Rose and Joe Ramos, as intervening creditors, filed an involuntary petition in bankruptcy (14-22).

In the original petition and in the amended petition of Spurlock, Dempsey and Selman, it is alleged that Association "is a corporation, duly created and existing under and by virtue of the laws of the State of Arizona * * * and has been engaged in the business of issuing certificates of indebtedness agreeing to pay thereon six per cent per annum, and with the provision of the withdrawal of sums deposited upon said certificates on notice and making loans upon real estate and otherwise doing a general building and loan business." In the amended petition, however, between the words quoted "is a" and "corporation," is added "moneyed and business." In intervening creditors (Mary Rose, Ray L. Rose and Joe Ramos) involuntary petition it is alleged that Association "is a moneyed and business corporation organized under and pursuant to the laws of the state of Arizona * * * and is principally engaged in the building and loan association business and the lending of money as such

building and loan association upon real estate for the improvement thereof and other purposes, and has been duly incorporated for that purpose." (14). Motions to dismiss the hereinbefore mentioned original and amended involuntary petition and intervening creditors involuntary petition were seasonably filed by Association and by State Court Receiver Ben H. Dodt (7-8, 29-31, 41-46). The ground upon which dismissal was sought in said motions was that the United States District Court was without jurisdiction because Association was a building and loan association and therefore not subject to be adjudged a bankrupt under Section 4 of the Bankruptcy Act of July 1, 1898, as amended February 11, 1932. On February 13, 1932, upon a hearing of said motions, an order was duly given, make and entered by the United States District Court reading, "It is ordered that said alleged bankrupt's motion to dismiss amended creditors petition in bankruptcy and said alleged bankrupt's motion to dismiss intervening creditors involuntary petition filed January 21, 1932, will be granted unless the petitions of creditors be amended to show the jurisdiction of this court and filed within ten days from and after this date." (39).

Spurlock, Dempsey and Selman, the original petitioning creditors, did not file any amended involntary petition as required by the order of the court, but on February 23, 1932, there was filed herein (58) an instrument dated "Phoenix, Arizona, February 15, 1932. Mr. Lemuel P. Mathews,

Atty., Phoenix, Arizona. Dear Mr. Mathews: Regarding Case No. B-629 Phoenix in the District Court of the United States for the Federal District of Arizona—Security Bldg. and Loan Assn. alleged Bankrupt. Please be advised that we the undersigned, do not wish to amend the proceedings already filed, neither do we want you to sign our names or allow our names to be used further in this matter. We have been told of the recent act of congress exempting Building and Loan Ass'ns from Bankruptcy. You are hereby advised and instructed not to amend the proceedings already filed and also not to file any other proceedings in our names and to do nothing further in the matter. Yours very truly, W. L. Selman, Ted Dempsey, J. H. Spurlock." Original petitioning creditors have not participated in this case subsequent to February 23, 1932, notwithstanding the United States District Court refused to dismiss their involuntary petition upon motion made at the commencement of the trial of this case on May 24, 1932 (157-159).

On February 19, 1932, intervening creditors, Mary Rose, Ray L. Rose and Joe Ramos, filed a petition for leave to amend their involuntary petition and on said date an order was entered permitting them so to do (46-48). On February 20, 1932, said intervening creditors filed their amended involuntary petition (49-57). On March 14, 1932, Association filed its answer to intervening creditors amended involuntary petition (59-103). On March

14, 1932, Lillian M. Erwin filed petition for leave to intervene and on said date obtained an order permitting her to intervene (104-106). On March 14, Lillian M. Erwin filed an involuntary petition (106-114). March 15, 1932, Luther M. Frink, E. Dale Frink, John H. Digges, Billie Leiber, Hattie M. Leiber, Hattie Schneider Leiber, Henry F. Leiber, Henry Leiber, Jr., and Herman Leiber filed an involuntary petition joining with the amended petition of Mary Rose, Ray L. Rose and Joe Ramos, pursuant to order of the court permitting them so to do (115-128). A stipulation was entered into between counsel that the answer of alleged bankrupt to amended petition of intervening creditors Mary Rose, Ray L. Rose and Joe Ramos should stand as an answer to involuntary petition of intervening creditor Erwin (129) and also to joining involuntary petition of Luther M. Frink and the others named joining with him (147-148). On May 23, 1932, Ben H. Dodt, State Court Receiver, filed answer to all creditors and intervening creditors amended involuntary petitions (149-157).

The case was tried beginning May 24, 1932, upon the amended petition of Mary Rose, Ray L. Rose and Joe Ramos filed February 20, 1932 (49-57) and upon involuntary petition of Lillian M. Erwin filed March 14, 1932 (106-114) and upon petition of Luther M. Frink and those other persons with him associated, filed March 15, 1932 (115-128), and upon the answer of Association filed March 14, 1932 (59-103) and upon the an-

swer of Ben H. Dodt, State Receiver, filed May 23, 1932 (149-157).

An examination of the original petition filed by intervening creditors Mary Rose, Ray L. Rose and Joe Ramos, and their amended petition, shows that these creditors about faced and, whereas they alleged in the original petition that Association was a building and loan association, in their amended petition they alleged that Association "is a moneyed and business corporation organized under and pursuant to the laws of the State of Arizona, and is not a municipal, railroad, insurance or banking corporation, or building and loan association, and is principally engaged in lending money on notes secured by mortgages upon real estate, and has been duly incorporated for that purpose" (49). The allegation of the involuntary petition of intervening creditor Lillian M. Erwin is substantially the same as that just quoted (106). The allegations of the joining petition of intervening creditors Luther M. Frink and those associated with him are as set forth in paragraph numbered "First" (123), that the Association "is a moneyed and business corporation organized under the laws of the State of Arizona, and is not a municipal, railroad, insurance or banking corporation, and is not a building and loan association, and is principally engaged in the business of loaning money upon notes secured by mortgages on improved and unimproved real estate throughout the State of Arizona," and, as set forth in paragraph numbered "Second" (123, 124, 125),

"That although said Security Building and Loan Association purports by its name to be a building and loan association, said corporation in truth and in fact is not and never has been a building and loan association, nor has it ever conducted or engaged in the business of a building and loan association, and that this is so for the following reasons, among others: That there has never been any completion of an organization of said corporation as a building and loan association under the laws of the State of Arizona, or at all, and that said corporation was not organized for the purposes for which a building and loan association was, or is, authorized to be incorporated under the laws of Arizona, and that said corporation never completed its organization and never qualified itself to do business as a building and loan association in accordance with the laws of Arizona, or at all. That no membership stock in said corporation has ever been subscribed for or issued; that no board of directors of said corporation has ever been elected in compliance with the provisions of the laws of the State of Arizona relating to the organization and conduct of the business of building and loan associations; that no stock in said corporation has ever been issued to the borrowers of money who have given notes and mortgages on real estate for the security of moneys loaned to them; and that the only capital stock ever issued by said corporation was 500 shares of the par value of $100.00 per share, which stock purported to be fully paid up stock, and was issued under the general incorpora-

tion laws of the State of Arizona, and not under the building and loan association laws; that according to the articles of incorporation of said corporation and its by-laws, said stock so issued had a right to all the dividends and profits of the corporation and to control the election of directors and the business in general of said corporation, all in contravention of the provisions of the statutes of Arizona with respect to the incorporation of and control of business by building and loan associations; that the only business in which said corporation has been engaged and which it has conducted and carried on is a general business of loaning money on real estate, and that in carrying on its said business, it has loaned money on improved real estate in amounts greatly in excess of sixty per cent of the conservative market value of said real property; that it has made loans on unimproved real estate without having made any contracts for the improvement of said land, and without having said land appraised by three appraisers who were members of said association, and the said corporation in the conduct of its general loaning business made two loans aggregating $66,000.00 in amount, secured by two mortgages on 240 acres of unimproved desert land near Wellton, in Yuma County, Arizona, said land being of an assessed value of only $10.00 per acre. That no loan has ever been made by said corporation in accordance with the regulations prescribed and required by the Statutes of Arizona for the loaning of money by building and loan associations."

Both the answer of Association and of Ben H. Dodt, State Receiver, puts in issue the quoted allegations of the foregoing petitions. The issue thus raised was the only issue tried and was the only issue in the case. All of the intervening creditors alleged in substance, which allegations were admitted, that the consideration for their several debts was on account of money loaned to the Association at its special instance and request, the amount being evidenced by certificates, giving the number, known as "pass book certificates." The act of bankruptcy consisting of suffering and permitting a receiver to be appointed in the state court, was admitted. Other alleged acts of bankruptcy were denied. All essential facts were admitted except the question whether or not the Association was, under Section 4 of the Bankruptcy Act of July 1, 1898, as amended February 11, 1932, subject to be adjudged a bankrupt. There was no evidence offered in relation to alleged acts of bankruptcy which were denied. In fact, the evidence was confined to the single issue of whether or not the Association was exempted from the provisions of the Bankruptcy Act of July 1, 1898, as amended, authorizing involuntary adjudication.

STATEMENT OF FACTS

Association was incorporated under and pursuant to Chapter 76 of the 1925 Session Laws of Arizona, Regular Session, Seventh Legislature,

which said chapter is entitled: "To Provide for the Organization of Building and Loan Associations; Regulating and Defining the Duties and Obligations of the Members, Directors and Officers of said Associations; Prescribing the Power of the Superintendent of Banks over said Associations; Prohibiting the doing of Business by any Company not Qualifying under this Act and Prescribing a Penalty for the Violation thereof; and Repealing all Acts and parts of Acts in Conflict with the Provisions of this Act." Defendant's Exhibit B in evidence (716-734). Chapter 76 of the 1925 Session Laws of the Regular Session of the Seventh Legislature of the State of Arizona has been revised and, as revised, is now Article 4 of Chapter 14 of the Revised Code of Arizona, 1928, entitled, "Building and Loan Associations," Sections 612-628, both inclusive, effective July 1, 1929.

Articles of Incorporation of Association were signed and acknowledged as deeds of real property are required to be signed and acknowledged on the 5th day of March, 1929, by Louis T. Beach, E. T. Cusick, W. C. Evans, J. C. Barnes and H. V. Bell (81-84). Said Articles of Incorporation were filed March 8, 1929, in the office of the Arizona Corporation Commission, Incorporating Department, after exchange of letters between Association's counsel, Arizona Corporation Commission, State Treasurer and Superintendent of Banks. Defendant's Exhibit B in evidence (716-734). These communications definitely show the purpose and intent of the Asso-

ciation to comply with the laws of Arizona so that it could become and transact the business of a building and loan association, and also show the performance of duty by the public officers of Arizona, namely, Arizona Corporation Commission, State Treasurer of the State of Arizona and Superintendent of Banks of the State of Arizona.

Said articles were published as required by law. Affidavit proving such publication was filed in the office of the Arizona Corporation Commission, Incorporating Department, April 19, 1929 (60).

In the Articles of Incorporation, among other things, it is provided:

"That the name of said corporation shall be Security Building and Loan Association" (81).

"That the purposes for which said corporation is formed are to encourage industry, frugality, homebuilding, and savings among its shareholders, members and others; the accumulation of savings; the loaning of its shareholders, members and others of the moneys or funds so accumulated, with the profits and earnings thereon, and the repayment to each all his savings and profits, whenever they have accumulated to full par value of the shares or at any time when he shall desire the same, or when the Corporation shall desire to repay the same, as it may be provided in the By-laws; and generally to do any and all other acts and things authorized by law, and more particularly by and under Chap-

ter 31, 1922, Arizona Session Laws, Chapter 11, 1923, Arizona Session Laws, and Chapter 76, 1925, Arizona Session Laws, and for all other purposes and with all the rights, powers, privileges and immunities in said laws set forth" (81-82) * *.

"That the number of directors of said Corporation shall be not less than five (5), or more than fifteen (15), a majority of whom shall at all times each be the owner and holder of not less than ten (10) shares of the capital stock" (82)* *.

"That the amount of capital stock of this Corporation is Five Million ($5,000,000.00) dollars, and the number of shares into which it is divided is Fifty Thousand (50,000), of the par value of one Hundred ($100) Dollars each, all of which, when issued, shall be set apart as a fixed and permanent guaranteed capital. Additional working capital may be accumulated by the issuance of membership shares, units and certificates, both installment and fully paid as provided for in Chapter 76, 1925 Arizona Session Laws, and the by-laws of this Corporation" (83).

"That the amount of said capital stock which has been actually subscribed is Forty-five Thousand ($45,000) Dollars, and the whole thereof has been subscribed to and fully paid for by the Arizona Holding Corporation, a corporation organized and existing under and by virtue of the laws of the State of Arizona" (83).

By-laws of Association were adopted by the incorporators acting as the board of directors and were filed in the office of the Arizona Corporation Commission on the 8th day of March, 1929 (62). In the by-laws, among other things, it is provided:

Article I, Section 3. "The object and purpose of this corporation shall be to encourage industry, frugality and the accumulation of savings among its shareholders, members and others, and to make loans to its shareholders, members and others for the purpose of aiding them in acquiring and improving real estate" (63).

Article II, Section 2. "The majority of the board of directors shall always be selected from those holding ten or more shares of capital stock, and the minority may be selected from holders of membership shares" (63).

Article II, Section 3. "The capital stock shall participate in the net earnings of the association to the full extent permitted, or which may be permitted, under the provisions of the laws of the State of Arizona and as interpreted by the Arizona Corporation Commission and or the State Superintendent of Banks.

"As provided for in Section 12, Chapter 76, 1925, Arizona Session Laws, this association will set aside from its earnings five per cent (5%), to a reserve fund until such fund shall equal fifty per cent (50%) of the total libaility of the association to its members" (63-64)**.

Article III, Section 1. "The affairs of the corporation shall be managed by a board of not less than five or more than fifteen directors, who shall be elected annually from the shareholders and members, in the manner provided by law, to hold office for one year, and until their successors are duly elected and qualified" (64).

Article IV, headed "Powers and Duties of Directors," subdivisions Fourth and Fifth of Section 1:

"Fourth. To loan the funds of the corporation, or such portion thereof as may be advisable, upon such securities as are provided by law, and to prescribe the terms and conditions upon which loans may be made; provided, that whenever loans are made upon the definite contract plan the body of the note or obligation shall set forth the number of installments, and the amount of each installment required to repay the principal of the loan, together with the interest on the periodical unpaid balances, within the time agreed upon, the exact rate of interest to be specified in each note or obligation.

"Fifth. To borrow money for the purpose of making loans or with which to pay withdrawals or maturities" (65-66).

ArticleV, headed "Duties of Officers," under the subdivision relating to committees and sub-heading "Security Committee," provides:

"Section 1. It shall be the duty of the security committee to ascertain the market value of each and every piece of property offered as security for any proposed loan and to report thereon, in writing, to the Loan Committee.

"Section 2. Every application for a loan shall be approved in writing by at least two members of said committee before the loan shall be made" (69).

Article VIII, headed "Membership Shares," provides:

"Section 1. Membership shares having an ultimate matured or par value of One Hundred ($100) Dollars each may be issued at such time and in such manner as the board of directors may prescribe, or in accordance with the terms and provisions of the charter of this corporation.

"Section 2. Membership shares may be classified as installment or full pay. Each subscriber to the installment shares shall become entitled to said shares when the payments made thereon, together with the profits apportioned thereto, shall amount to the sum of One Hundred ($100) Dollars for each of such shares, at which time the shares shall mature and payments thereon shall cease. Full paid membership shares may also be issued at such times as the board of directors may determine to subscribers paying in the full face value of One Hundred ($100) per share. Dividends at such rate

per annum as may be fixed by the board of directors, not exceeding a full participation in the net profits, shall be paid on these shares.

"Section 3. Holders of either form of membership shares are members of the corporation, with all the rights, powers and privileges incident thereto, including the right to vote at all meetings of the shareholders and members—one vote for each share—and are subject to the same restrictions and liabilities.

"Section 4. An entrance fee of not exceeding Two Dollars ($2) per share may be charged and collected upon all installment membership shares" (71-72).

Article IX, headed "Investment Certificates," provides:

"Section 1. Investment certificates having an ultimate matured or par value of One Hundred ($100) each, may be issued in either of the following forms:

No. 1.

Pass Book Shares:

Can deposit and withdraw at will up to $100.00. Interest paid on minimum monthly balance at 5%. When $100.00 is accumulated can convert to Full Paid Coupon Investment Certificate paying 6%.

No. 2.

Full Paid Investment Coupon Certificates:

Issued in units of $100.00. May be withdrawn after 12 months on 30 days' written notice (at option of Board of Directors). Non-callable for three years. 6% quarterly coupons attached.

No. 3.

Installment Investment Certificates:

Class A:

$6.00 per month for 120 months pays $1000.

Class B:

$3.50 per month for 174 months pays $1000.

Class C:

$13.00 per month for 65 months pays $1000.

Member may withdraw full amount paid in less cancellation fee together with interest at 7% compounded semi-annually up at last dividend paying date by giving 30 days' written notice.

No. 4.

Monthly Income Certificate:

Issued in amounts of $2000 or more paid in full. Monthly income checks will be mailed the first of each month at 6%. Withdrawable after 12 months on 30 days' written notice (at option of Board of Directors). Certificate is non-callable for three years.

No. 5.

Prepaid Certificates:
Class A:

By making a cash payment of $350 person may withdraw $1000 at end of 180 months.
Class B:

By making cash payment of $400 person may withdraw $1000 at end of 160 months.

Class C:

By making cash payment of $500 person may withdraw $1000 at end of 120 months.

On the above class of certificates the money accumulates at 7% interest compounded semi-annually.

"Section 2. An entrance fee of Two Dollars ($2) per certificate may be charged and collected upon the installment investment certificates, and upon prepaid certificates.

"Section 3. Holders of any of the forms of investment certificates above designated are not members of the corporation, and have none of the rights, powers and liabilities incident thereto" (72-74).

Article X, headed "Withdrawal and Maturities," provides:

"Section 1. Holders of installment membership shares, and of installment investment certificates, desiring to withdraw a part or all of the amount

to the credit of their shares or certificates, may do so by giving thirty (30) days' written notice of their intention or desire so to do. On the expiration of such notice, they are entitled to receive the full amount paid in upon their membership shares or investment certificates, exclusive of any entrance fee charged and collected, together with such proportion of the earnings thereon as may have been fixed by the board of directors; provided that not more than one-half of the monthly receipts of any one month shall, without the consent of the board of directors, be applicable to withdrawals for that month. All withdrawals will be paid in succession and in the order in which the notices of intention were filed. Shares or certificates pledged as security for or with a loan can not be withdrawn in money until the loan is fully paid" 74-75).

Article XI, headed "Loans," provides:

"Section 1. Loans may be made on such terms and at such rate of interest as the board of directors may determine provided that whenever loans are made for a definite period on the installment plan, the number of installments, and the amount of each installment required to pay the principal of the loan together with interest at the agreed rate on the periodical balances, within the time specified, must be expressed in the face of the note or obligation taken.

"Section 2. Loans will only be made upon the security of a first mortgage or deed of trust of

real estate, or upon the security or pledge of membership shares, or investment certificates of this association, or upon other bonds and securities which may be approved of by the State Superintendent of Banks.

"Section 3. Loans upon the security of membership shares or investment certificates shall not be made in excess of ninety per cent of the withdrawal value of such shares or certificates.

"Section 4. Loans made for a definite period on the installment plan may be repaid at any time by paying the balance then unpaid on the principal and all arrears of interest, if any. The corporation reserves the right to charge a penalty of two months' interest on the unpaid balance if repaid within one year from date of note, or a penalty of one months' interest on the unpaid balance if repaid after one year from date of the note but in advance of the time set forth in the contract.

"Section 5. Whenever a borrower shall be three months in arrears in the payment of his interest or loan installments, unless otherwise provided in the note, the whole loan shall become due, at the option of the board of directors, and they may proceed to enforce collection upon the securities held by the corporation. The withdrawal value of all shares or certificates pledged as collateral security shall be applied in part payment of the loan and said shares or certificates shall be deemed cancelled and surrendered to the corporation.

"Section 6. All expenses incident to abstracts, examinations of title, execution of papers, attorney's fees, or sale of securities pledged as security for loans or advances, shall be paid by the party offering the security or securing the loan.

"Section 7. Borrowers must furnish, at their own expense, acceptable policies of fire insurance on all improved realty pledged as security for loans granted, with the usual mortgage clause making loss, if any, payable to the corporation, as its interest may appear" (75-77).

Article XII, headed "Fines and Penalties," provides:

"Section 1. Borrowers who neglect or fail to pay their interest or loan installments in accordance with the terms of the note or obligation shall pay interest at not exceeding one per cent per month on the amount of such delinquent indebtedness.

"Section 2. The same rate of interest shall apply to all advances made by the association for insurance premium, street or sewer assessments, balances due for unpaid taxes on property pledged as security for loans, or other like advances" (77).

Article XIII, headed "Miscellaneous," provides:

"Section 1. Each member or investor shall be entitled to a certificate of 'membership shares' or 'investment certificates' showing the number of such

shares or certificates held, and their par, or ultimate value, and each member or investor holding installment membership shares or installment investment certificates shall also be furnished with a pass book, in which to record the periodical payments made by him, and in which the terms and conditions attaching thereto shall be fully set forth. These certificates may be transferred by assignment, in person or by an attorney, but no such assignment shall be valid, except between the parties thereto until duly entered upon the books of the corporation. A transfer fee of fifty cents for each share or certificate transferred will be charged by the corporation.

"Section 2. In the event of loss of any certificates of stock, membership shares or investment certificates, the recorded owner shall be entitled to a duplicate upon making an affidavit setting forth the facts of the loss and the filing of an acceptable bond, with two or more sureties, in an amount equal to the book value of the certificate lost.

"Section 3. The board of directors may provide that partial withdrawals, made 'mid-term,' shall not participate in the earnings on the amount withdrawn, that shall have accumulated since the last apportionment of profits.

"Section 4. The seal of the corporation shall be circular in form, bearing the name of the corporation and the date when incorporated.

"Section 5. As to all features not specifically covered by these by-laws, the provisions of Chapter 76, 1925, Arizona Session Laws, and all laws of the State of Arizona, shall govern the transaction of business by this Corporation" (78-79).

That Association before the completion of its organization applied to the Superintendent of Banks of the State of Arizona for permission to carry on the business of a building and loan association and paid to said Superintendent of Banks the fee fixed by the Superintendent of Banks and prescribed by law, to-wit, fifty dollars, to cover the cost of investigation by the Superintendent of Banks, as prescribed by law. The fact of payment of fifty dollars was stipulated by the parties (715). Upon such payment, the Superintendent of Banks made an investigation as prescribed by law (85).

On the 12th day of March, 1929, Association deposited with Charles R. Price, State Treasurer of the State of Arizona, certificates of deposit issued by the First National Bank, Prescott, Arizona, numbered 14, 15, 16, 17 and 18, each in the sum of $10,000, and four notes and four mortgages in the aggregate sum of $10,000, which said certificates of deposit and said notes and mortgages were at the time they were deposited with said Charles R. Price, State Treasurer, approved by the Superintendent of Banks of the State of Arizona (94). Defendant's Exhibit E in evidence (714).

On the 12th day of March, 1929, a permit or license to do business as a building and loan associa-

tion for the fiscal year ending June 30, 1929, was issued by the Superintendent of Banks of the State of Arizona to Association. The Superintendent of Banks collected from Association five dollars fee prescribed by law for the issuance by him to a building and loan association of a permit or license. A like permit was issued and a like fee of five dollars paid on July 1, 1929, for the fiscal year ending June 30, 1930. A like permit was issued and a like fee of five dollars paid on July 1, 1930, for the fiscal year ending June 30, 1931. A like permit was issued and a like fee of five dollars paid on July 1, 1931, for the fiscal year ending June 30, 1932 (87).

The permit or license was issued upon a printed form provided for the purpose by the Superintendent of Banks of the State of Arizona (88). Defendant's Exhibit D in evidence (713).

Said printed form of permit or license was in the words and figures following, to-wit:

"$5.00 No.....

State of Arizona
State Banking Department

KNOW ALL MEN BY THESE PRESENTS:

That.....has compiled with the provisions of Revised Code 1928, relating to Banking, Building and Loan Associations.

Now, Therefore, I, Jas. B. Button, Superintendent of Banks of the State of Arizona, do hereby grant unto the said..... a License to use the name herein stated and transact the business of.....subject to the laws of Arizona, for the fiscal year ending June 30, A. D., 19....., unless said License be sooner revoked as provided by law.

In Witness Whereof, I have hereunto set my hand at the Capitol, in the City of Phoenix, this .....day of....., 19.....

.....

Superintendent of Banks" (88-89).

The certificates of deposit numbered 14, 15, 16, 17 and 18 and the four notes and mortgages in the aggregate sum of $10,000, were retained in the possession of Charles R. Price, Treasurer of the State of Arizona, until the 8th day of October, 1929. On the 7th day of October, 1929, and before the surrender of said certificates of deposit and said notes and mortgages, a $50,000 bond was executed by Association as principal and National Surety Company, a corporation, as surety, known as Banker's Blanket Bond. Said bond was approved by the Superintendent of Banks of the State of Arizona on October 7, 1929, and was deposited with Charles R. Price on October 8, 1929, in lieu of said certificates of deposit and said notes and mortgages (94). Defendant's Exhibit E in evidence (714).

Said surety bond remained in force and effect and in the possession of Charles R. Price until the 6th day of June, 1930, on which said date said bond was terminated and canceled and returned to Association after on said June 6, 1930, there was deposited with Charles R. Price, State Treasurer of the State of Arizona, by Association, notes and mortgages, assets of the Association, of the total value of $59,518.39, all of which had theretofore been approved by the Superintendent of Banks of the State of Arizona (94-95). Defendant's Exhibit E in evidence (714). Notes and mortgages, property of the Association, approved by the Superintendent of Banks of the State of Arizona, aggregating in excess of $50,000, have been at all times since June 6, 1930, in the possession of the State Treasurer of the State of Arizona (95). Defendant's Exhibit E in evidence (714).

At the time of the filing of the involuntary petition in bankruptcy there was in the hands of the State Treasurer of the State of Arizona notes and mortgages, all of which had been theretofore approved by the Superintendent of Banks of the State of Arizona, the following:

$1,342.12 Shurts, G. W. and Susan E. Note and Mortgage. Dated December 18, 1929.
1,819.21 Lytle, W. R. and Carrie B. Note and Mortgage. Dated December 18, 1929.
2,000.00 Asberry, Seth C. and Mae L. Note and Mortgage. Dated January 25, 1930.
4,200.00 Krotzer, Harry W. and Martha H.

Note and Mortgage. Dated March 20, 1930.
2,850.00 McCreary, Aaron M. and Elsie. Note and Mortgage. Dated March 10, 1930.
4,528.76 Fordham, M. M. Note and Mortgage. Dated March 27, 1930.
5,100.00 York, R. A. Note and Mortgage. Dated March 28, 1930.
7,200.00 Lehmbert, H. B. and Joy. Note and Mortgage. Dated April 10, 1930.
2,569.82 Brean, Ernest A. and Cora B. Note and Mortgage. Dated October 14, 1930.
1,569.89 Nelson, Harry and Anna B. Note and Mortgage. Dated June 4. 1930.
3,500.00 Hunter, Sadie Robson. Note and Mortgage. Dated July 1, 1930.
3,000.00 West, E. J. and Veralda. Note and Mortgage. Dated March 1, 1930.
3,700.00 Wilbar, F. S. and Mildred C. Note and Mortgage. Dated July 15, 1930.
2,500.00 Johnson, Ivan C. and Mary W. Note and Mortgage. Dated September 16, 1930.
1,015.00 Flake, Osmer and Ethel R. (assumed by W. B. Stone). Note and Mortgage. Dated October 14, 1930.
1,819.30 Flake, Osmer D. and Ethel R. Note and Mortgage. Dated October 14, 1930.
5,900.00 Sly, Will and Carrie. Note and Mortgage. Dated June 18, 1931.
1,700.00 Pinney, Chas. J. and Lucile E. Note and Mortgage. Dated April 6, 1931.
1,755.50 Smith, Milton P. and Fannie Field. Note and Mortgage. Dated May 20, 1931.
2,100.00 Smith, Milton P. and Fannie Field. Note and Mortgage. Dated May 20, 1931.
1,850.00 DeBerge, Ray H. and Lorene A.

Note and Mortgage. Dated March 6, 1931.
1,611.26 Flake, Osmer D. and Ethel R.
Note and Mortgage. Dated February 15, 1931.
1,500.00 Borden, William H. and Mary E.
Note and Mortgage. Dated June 20, 1930.
(95-97). Defendant's Exhibit E in evidence (714).

Said certificates of deposit, said notes and mortgages and said bond all were approved by the Superintendent of Banks and deposited with the State Treasurer of Arizona pursuant to the laws of the State of Arizona covering and relating to building and loan associations doing and transacting business in the State of Arizona (97). Defendant's Exhibit E in evidence (714).

The Superintendent of Banks of the State of Arizona at all times since issuing to Association the first permit or license to do and transact the business of a building and loan association treated Association as a building and loan association and received and collected from Association the fees prescribed by law to be paid by building and loan associations and examined Association as a building and loan association commencing at nine-thirty A. M. January 11, 1930 and completed the examination at seven P. M. January 13, 1930. In this examination, the Superintendent of Banks, in his official capacity, examined into the stock structure and every phase of the business of the Association, Petitioner's Exhibit 35 (298-326). The Association continued, following this examination, to trans-

act business. Beginning at eight forty-five A. M. September 1, 1931, the Superintendent of Banks again examined the Association as a Building and Loan Association, the examination being completed at four-thirty P. M. September 3, 1931, Petitioner's Exhibit 36 (327-375). The Superintendent of Banks made calls upon Association, as he did upon other banking institutions and building and loan associations for statements as a building and loan association at the close of business at the times provided by law. Pursuant to such calls, Association filed with the Superintendent of Banks and published seven reports of the condition of its business, to-wit as of the close of business on the following dates: March 27, 1930, June 30, 1930, September 24, 1930, December 31, 1930, March 25, 1931, June 30, 1931 and September 29, 1931, Petitioner's Exhibit 37 (378-470).

The Superintendent of Banks in his official capacity and in the performance of his duties prescribed by the statutes of Arizona, determined that Association was at all times since the commencement of its existence and at the date of the filing of the petition in bankruptcy was a building and loan association (98), Defendant's Exhibit D in evidence (713). Charles R. Price, Treasurer of the State of Arizona, also dealt with and treated Association as a building and loan association, and the acts recited in this statement of facts as having been performed by the State Treasurer were pursuant to law prescribing his duties as State

Treasurer in relation to building and loan associations. He was acting under the advice of the Attorney General of the State of Arizona (734-736). Mit Sims, who succeeded Charles R. Price as State Treasurer, acted in his official capacity with respect to Association (736-737).

On the 16th day of November, 1931, the Superintendent of Banks of the State of Arizona served upon Association a notice signed by him in his official capacity, dated the 14th day of November, 1931, revoking the permit or license issued to Association June 30, 1931, authorizing Association to engage in the business of a building and loan Association. Said notice is in the words and figures following, to-wit:

Great Seal of the State of Arizona

"State Banking Department

State House

Phoenix, Arizona

S. W. Ellery,
Superintendent of Banks,

Leo N. Roach,
Chief Examiner,

A. G. King,
Examiner,

L. V. Bailey,
Examiner,

A. T. Hammons,
Inspector,
Minnie Seaman,
Accountant-Stenographer

November 14, 1931

Dear Mr. Perkins:

Please take note that the license of the Security Building and Loan Association, permitting you to do business in this State, is hereby revoked by this office to take effect immediately.

Yours, very truly,

S. W. Ellery,
Superintendent of Banks.

Mr. Glen O. Perkins, Secretary,
Security Bldg. & Loan Assn.,
Tucson, Arizona,
C.C. Gov. Geo. W. P. Hunt,
K. Berry Peterson,
Attorney General." (90), Defendant's Exhibit F (714-715).

On the 16th day of November, 1931, by the Superior Court of the State of Arizona, in and for Maricopa County, Ben H. Dodt was appointed receiver of Association in an action filed by one Ennis Taber as plaintiff against Association (89).

It is undisputed that Association transacted business from about March 12, 1929, to November 16, 1931.

On September 4, 1929, the appointment of E. T. Cusick as statutory agent was filed in the office of the Arizona Corporation Commission and certificate of incorporation was forwarded by the Arizona Corporation Commission to E. T. Cusick, attorney for the Association. Defendant's Exhibit B in evidence (716), and stipulation (202).

Association issued certificates to those doing business with it in the several forms shown by Petitioner's Exhibits Nos. 10, 11, 12, 13, 14, 15, 16, 17 (212) 18, 19, 20, 21, 22, 23 (221).

There was received by the Association from approximately 2304 persons the aggregate sum of $121,711.83, $28,165.38 thereof through the Tucson office and $93,546.35 thereof through the Phoenix office by the issuance of Pass Book Certificates similar either to Exhibit 15, 16 or 17 (221 and 223). The form of these Pass Book Certificates appears in full (212-220). The form of investment certificates like Exhibits 10, 11, 12, 13 and 14 and reproduced by photostatic copies inserted (212) and likewise the forms of certificates like Exhibits 18, 19, 20, 21, 22 and 23 are reproduced by photostatic copies (221). We shall not set forth in this statement of facts the exact form of these various certificates, but refer the court to the forms in full as they appear in the record at the designated point.

There was received by the Association from approximately 64 persons the aggregate sum of $57,-

078, $12,500 thereof through the Tucson office and $44,578 thereof through the Phoenix office by the issuance of fully paid non-coupon certificates similar to Exhibit 20 (221, 224).

There was received by the Association from approximately 10 persons the aggregate sum of $5500 by the issuance of fully paid coupon certificates similar to Petitioner's Exhibits 14 and 19 (221-222 and 225).

There was received by the Association from approximately 44 persons the aggregate sum of $2996.62 by the issuance of installment investment certificates similar in form to one or the other of Petitioner's Exhibits 10, 11, 12, 13, 18, 21, 22 or 23 (222 and 226-229).

The total received from all of the foregoing it was stipulated did not represent the paid up value of the several certificates but only the cash paid in value (222). Aside from the original purchase of stock, the amounts specified herein as received upon the issuance in various forms of certificates represents the greater portion of all moneys received by the Association. There were other moneys received, some of which was borrowed by the Association but we deem it unnecessary to detail the source of same to an understanding of the case.

Association held intact receipts amounting to $415.01 under order of the Superintendent of Banks for the last two or three days of its business Schedule J of Exhibit 24 (254).

At the time of filing the involuntary petition, notes and mortgages in connection with twenty-three loans were in the custody of the State Treasurer of Arizona, each of which had been approved by the Superintendent of Banks. Defendant's Exhibit E in evidence (95-97) and (714). A list of these twenty-three loans are set out in this statement of facts and the aggregate thereof amounts to the sum of $65,130.86.

A schedule of fifty-nine additional real estate loans is found in defendant's Exhibit A in evidence (265-272). These aggregate $250,427.45. These notes were sold to Century Investment Trust, a corporation, on October 1, 1931 for $250,427.45 evidenced by promissory note payable in installments. Defendant's Exhibit A (265). These notes were after sale, held by Association as collateral and were not to be released until their purchase price was paid. Other loans were made by the Association during its business existence which had been paid.

Association made other real estate loans during its entire business, and with the exception of a few isolated loans, there is no evidence to show that any mentioned real estate loans were not made substantially in compliance with the law relating to a building and loan association.

Much evidence was introduced by Petitioners over objection of the Association and State Receiv-

er Ben H. Dodt, but we do not in our view of the case deem any further inclusion of facts necessary to an understanding of the case. We believe we have stated the material facts.

SPECIFICATION OF ERRORS

I. THE UNITED STATES DISTRICT COURT ERRED IN NOT FINDING THAT ASSOCIATION IS EITHER A BUILDING AND LOAN ASSOCIATION OR A BANKING CORPORATION INCORPORATED UNDER THE LAWS OF THE STATE OF ARIZONA PROVIDING FOR THE INCORPORATION OF BUILDING AND LOAN ASSOCIATIONS AND BANKS AND ALSO ERRED BY FINDING ASSOCIATION TO BE A MONEYED AND BUSINESS CORPORATION INCORPORATED UNDER THE GENERAL CORPORATION LAWS OF THE STATE OF ARIZONA AND NOT TO BE A BANK OR A BUILDING AND LOAN ASSOCIATION.

This specification of errors is presented through Assignments of Errors 1, 2 and 3 which are as follows:

> ASSIGNMENT OF ERROR 1. The United States District Court erred in finding that the Security Building & Loan Association is a moneyed and business corporation, incorporated under the general corporation laws of the State of Arizona, and is not a banking corporation nor a building and loan association. (741)

ASSIGNMENT OF ERROR 2. The United States District Court erred in failing to find that Security Building & Loan Association, a corporation, is not a moneyed and business corporation incorporated under the general corporation laws of the State of Arizona. (741)

ASSIGNMENT OF ERROR 3. The United States District Court erred in failing to find that Security Building & Loan Association, a corporation, is a building and loan association or a bank incorporated under the laws of the State of Arizona relating to the incorporation of building and loan associations and banks. (741)

II. THE UNITED STATES DISTRICT COURT ERRED IN NOT FINDING THAT ALL OR A PORTION OF THE BUSINESS TRANSACTED BY ASSOCIATION WAS THE BUSINESS OF A BANK OR THE BUSINESS OF A BUILDING AND LOAN ASSOCIATION.

This specification of errors is presented through Assignments of Errors 4 and 5, which are as follows:

ASSIGNMENT OF ERROR 4. The United States District Court erred in failing to find that all of the business transacted by the Security Building & Loan Association was the business of a building and loan association or the business of a bank. (741)

ASSIGNMENT OF ERROR 5. The United States District Court erred in failing to find

that at least a portion of the business transacted by Security Building & Loan Association was the business of a bank or the business of a building and loan association. (742)

III. THE UNITED STATES DISTRICT COURT ERRED BY FAILING TO CONCLUDE AS A MATTER OF LAW THAT ASSOCIATION WAS EXEMPTED FROM BEING ADJUDGED A BANKRUPT BY VIRTUE OF THE PROVISIONS OF SECTION 4 OF THE BANKRUPTCY ACT OF JULY 1, 1898 AS AMENDED FEBRUARY 11, 1932 AND THAT THE UNITED STATES DISTRICT COURT WAS WITHOUT JURISDICTION. SAID DISTRICT COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT IT HAD JURISDICTION TO ADJUDGE SAID ASSOCIATION A BANKRUPT AND THAT SAID ASSOCIATION WAS BANKRUPT.

This specification of errors is presented through Assignments of Errors 6, 7, 8 and 9, which are as follows:

ASSIGNMENT OF ERROR 6. The United States District Court erred in concluding, as a matter of law, that said court had jurisdiction to adjudge Security Building & Loan Association, a corporation, bankrupt. (742)

ASSIGNMENT OF ERROR 7. The United States District Court erred in concluding, as a matter of law, that said Security Building & Loan Association is bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy. (742)

ASSIGNMENT OF ERROR 8. The United States District Court erred in failing to conclude, as a matter of law, that the Security Building & Loan Association is not subject to be adjudged bankrupt. (742)

ASSIGNMENT OF ERROR 9. The United States District Court erred in failing to conclude, as a matter of law, that it was without jurisdiction to adjudge the Security Building & Loan Association, bankrupt. (742)

IV. THE DECREE OF THE UNITED STATES DISTRICT COURT (182-192) IS ERRONEOUS IN THAT IT ADJUDGED ASSOCIATION A BANKRUPT AND IN THAT IT DID NOT DISMISS THE INVOLUNTARY PETITIONS. THE UNITED STATES DISTRICT COURT ERRED IN ADJUDGING ASSOCIATION A BANKRUPT AND IN NOT DISMISSING THE INVOLUNTARY PETITIONS.

This specification of errors is presented through Assignments of Errors 10 and 11, which are as follows:

ASSIGNMENT OF ERROR 10. The United States District Court erred in adjudging the Security Building & Loan Association, bankrupt. (742)

ASSIGNMENT OF ERROR 11. The United States District Court erred in not dismissing the involuntary petition in bankruptcy against the Security Building & Loan Association for lack of jurisdiction to adjudge it bankrupt. (742-743)

ARGUMENT

I

Specification of Errors I and III will be considered together.

SPECIFICATION OF ERRORS I. THE UNITED STATES DISTRICT COURT ERRED IN NOT FINDING THAT ASSOCIATION IS EITHER A BUILDING AND LOAN ASSOCIATION OR A BANKING CORPORATION INCORPORATED UNDER THE LAWS OF THE STATE OF ARIZONA PROVIDING FOR THE INCORPORATION OF BUILDING AND LOAN ASSOCIATIONS AND BANKS AND ALSO ERRED BY FINDING ASSOCIATION TO BE A MONEYED AND BUSINESS CORPORATION INCORPORATED UNDER THE GENERAL CORPORATION LAWS OF THE STATE OF ARIZONA AND NOT TO BE A BANK OR A BUILDING AND LOAN ASSOCIATION.

SPECIFICATION OF ERRORS III. THE UNITED STATES DISTRICT COURT ERRED BY FAILING TO CONCLUDE AS A MATTER OF LAW THAT ASSOCIATION WAS EXEMPTED FROM BEING ADJUDGED A BANKRUPT BY VIRTUE OF THE PROVISIONS OF SECTION 4 OF THE BANKRUPTCY ACT OF JULY 1, 1898 AS AMENDED FEBRUARY 11, 1932 AND THAT THE UNITED STATES DISTRICT COURT WAS WITHOUT JURISDICTION. SAID DISTRICT

COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT IT HAD JURISDICTION TO ADJUDGE SAID ASSOCIATION A BANKRUPT AND THAT SAID ASSOCIATION WAS BANKRUPT.

Section 4 of the Bankruptcy Act of July 1, 1898 as amended February 11, 1932, reads as follows:

> "SEC. 4. Why may become bankrupts.—(a) Any person, except a municipal, railroad, insurance, banking corporation, or a building and loan association, shall be entitled to the benefits of this act as a voluntary bankrupt.
>
> "(b) Any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business or commercial corporation (except a municipal, railroad, insurance, or banking corporation, or a building and loan association) owing debts to the amount of $1,000 or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act.
>
> "The bankruptcy of a corporation or association shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States."

Is the Association either a building and loan association or a bank? If it is either, then the United

States District Court is without jurisdiction to adjudge it a bankrupt. Such is the very language of the Bankruptcy Act as amended. Citation of authority is unnecessary. The District Court recognized the correctness of the foregoing statement.

The first inquiry in determining if the Association is a building and loan association or a bank we submit should be an examination of its articles of incorporation and its by-laws. A reference to the articles and by-laws (62-84) shows clearly that it is not an ordinary corporation. Indeed, in the articles of incorporation (81-82) we find in a statement of the purposes for which the Association is formed the statement: "to do any and all other acts and things authorized by law, and more particularly by and under Chapter 31, 1922, Arizona Session Laws, Chapter 11, 1923, Arizona Session Laws and Chapter 76, 1925, Arizona Session Laws."

The incorporators then put their finger upon the statute under which they purposed to incorporate. The title of Chapter 31, 1922 Arizona Session laws reads as follows:

> "AN ACT To Create a State Banking Department, to Provide for the Appointment of a Superintendent of Banks and Bank Examiners Prescribing the Qualifications of Such Officers and Defining Their Duties; Defining the Various Classes of Banks and Making Rules for their Governance; Limiting of Loans to Individuals, Firms or Corporations; Limiting

> Loans to Officers, Stockholders and Directors; Defining Liability of Stockholders; Defining Method of Liquidation and Reorganization of Insolvent Banks; Providing for the Levying of Assessments on Stockholders; Defining Unauthorized Banking; Providing for the Issuance of Licenses to State Banks; Defining Relations Between State Banks and Federal Reserve Banks and National Banks; Fixing Salaries and Providing for All Expenses and Costs in Carrying This Act Into Effect and Incurred Pursuant to the Provisions Thereof; Repealing Title IV of the Revised Statutes of Aribona, 1913, Civil Code, With All Acts Amendatory Thereof, Paragraphs 2129 and 2130 of Chapter 3, Title IX, Revised Statutes of Arizona, 1913, Civil Code, and All Other Acts or Parts of Acts in Conflict With the Provisions of This Act, and Declaring an Emergency."

The title of Chapter 11, 1923 Arizona Session Laws reads:

> "An Act to Amend Section 3 of Chapter 31, Session Laws of Arizona, 1922, Special Session, Providing for the Office of Superintendent of Banks; Fixing the Term of Office; Defining the Qualifications of This Officer; Prescribing the Official Bond; and Fixing the Salary; and Repealing all Acts and Parts of Acts in Conflict Herewith."

Referring to Chapter 76 of the 1925 Arizona Session Laws appearing in full in the appendix to this brief, we find it relates to the organization of building and loan associations. The court's attention is directed to the following appearing in Section 1

of said Chapter 76 of the 1925 Arizona Session Laws:

> "The words 'building and loan association' shall form a part of the name and *no corporation not organized under this act shall be entitled to use a name embodying either said combination of words.*"

The name adopted in the articles is "Security Building And Loan Association." (81) Necessarily therefore, this name would challenge the public authorities, but we do not need to rely alone upon the name. That it was intended that Association should be incorporated as a building and loan association is clearly apparent from defendant's Exhibit B in evidence (716-734). A part of this exhibit consists of letters one dated February 7, 1929, written to the Arizona Corporation Commission by E. T. Cusick, who was acting for incorporators of Association. In this letter Cusick stated:

> "Inclosed herewith you will please find a carbon copy of my letter to the State Banking Department explaining the status of the relation existing between the Arizona Holding Corporation and the proposed Arizona Security Building and Loan Association. * * * Due to the difference between an ordinary corporation and a building and loan association, I have made no mention of the 'highest amount of indebtedness' which the building and loan association can incur, nor have I mentioned that private property shall be exempt from the building and loan association debts, for we intend to make the capital stock of the building

and loan association a form of guaranteed capital stock.

"When you have the approval of the State Superintendent of Banks to the proposed and submitted by-laws and charter, I trust you will proceed with the usual issuance of Charter." (731-732.)

The carbon copy of letter referred to is addressed to James B. Button, State Banking Department, Phoenix, Arizona and is entitled "Re Arizona Security Building and Loan Association." It reads in part:

"I am forwarding herewith, in duplicate, copies of by-laws and a copy of the articles of incorporation of the above designated and proposed building and loan association. * * * As a proposed director and attorney for the building and loan association and attorney for the Arizona Holding Corporation, I respectfully request that your department investigate this matter, and trust that your department will notify the Arizona Corporation Commission of your approval of the issuance of a charter for said building and loan association." (732-734.)

On February 23, the Secretary of the Arizona Corporation Commission wrote Attorney Cusick in part as follows:

"We are in receipt of your wire of even date and are pleased to advise that the name 'Security Building and Loan Association' is available for corporate use.

"We are returning the articles, however, for

> the reason that the Commission wishes Article V revised to show that all the directors are stockholders instead of a majority." (727.)

February 26, Attorney Cusick replied to the letter last quoted from, saying in part:

> "I am returning herewith the articles of incorporation of the above designated association, with the corrections suggested in your letter of the 23rd. It has been the intention of the incorporators that the directors much be stockholders, and the by-laws so provide. The Superintendent of Banks advised me that he was ready to give a clearance on this matter at any time you requested and I trust that you will give this matter your immediate attention, as $50,000 lying idle is a rather severe loss." (729.)

In answer to this communication, under date of February 27, the Secretary of the Arizona Corporation Commission wrote Attorney Cusick in part as follows:

> "Please be advised that we have again requested the Honorable James B. Button, Superintendent of Banks, for a clearance in the matter of the Security Building and Loan Association, and he advises that he wishes to hold this in abeyance for a few more days.
>
> "The articles are now all right for filing and we are holding same together with your check pending the receipt of the clearance from the banking department." (728.)

On March 6, 1929, the Secretary of the Arizona

Corporation Commission wrote Button, State Superintendent of Banks in part as follows:

> "We are holding for filing the articles of incorporation of the Security Building and Loan Association, subject to clearance from your department.
>
> "If convenient, may we ask you to give us your decision today?" (726.)

Two days later, March 8, Button, Superintendent of Banks wrote in reply:

> "This is to advise you that the Security Building and Loan Association, Tucson, Arizona, has complied with Chapter 76, Session Laws 1925, regarding the organization of building and loan associations.
>
> "You therefore have the permission of this department to issue a certificate of incorporation to the above association." (724.)

We again assert and the evidence comprised in Defendant's Exhibit B in evidence, from which the foregoing quotations have been taken, that it is undisputedly true that the incorporators of the Association intended to organize a building and loan association, and that the State Officials charged with duties and responsibilities incident to such organization, thoroughly so understood and performed their duties approving such organization.

Let us now see if the incorporation of Association complied with the provisions of Chapter 76 of the 1925 Arizona Session Laws. Article I desig-

nates the name of the Association. This complies with the law. In Article II, the purposes of the corporation are stated. The purposes are building and loan purposes, and the express statutory provisions relating to the organization of building and loan associations are referred to in this Article as are the acts relating to banks. Articles III and IV clearly state requirements and meet the provision of the statute as does also Article V. In Article VI is found provisions for the amount and kinds of stock that the Association will issue. In fact all requirements of the Act are complied with in the form and substance of the Articles.

The Association, it is true, failed to appoint a Statutory Agent until September 4, 1929, (202) and its formal certificate of incorporation was not delivered until that date, (716) but what of it? The agent was appointed and the certificate issued on September 4, 1929, more than two years before the Act of Bankruptcy and before the filing of petition in bankruptcy. We are not here concerned with the status of the Association except in a very general way before September 4, 1929. The only real interest is the status of the Association at the time of the Act of Bankruptcy and the filing of the involuntary petition. In Arizona it has been repeatedly held that there is no penalty or remedy for the failure to appoint a statutory agent except a suit for the dissolution of the company may be commenced by one of the parties named in the statute. Rillito Canal Co. vs. Schmidt, 11 Ariz.

49 (89 Pac. 523); Flowing Wells Co. vs. Culin, 11 Ariz. 425 (95 Pac. 111). If a suit for dissolution had been commenced and a statutory agent appointed before trial, the action would be dismissed. Big Four Advertising Co. vs. Clingan, 15 Ariz. 34 (135 Pac. 713). There is not to our knowledge any other irregularity in the organization of Association as a building and loan association. The by-laws, (62-80) we submit, fully comply with the law and for convenience of the court we have quoted from them at some length in our Statement of Facts. Assume the by-laws to be in some respects contrary to the law. It is settled that the statutes of Arizona are a part of the Articles and by-laws, and the statutory provisions would supersede any provision of the by-laws in conflict therewith. Foster vs. Bauman, 34 Ariz. 274 (271 Pac. 30)

At the time of organization Association deposited with the State Treasurer certificates of deposit on a solvent bank and certain notes and mortgages. For a period of time it had on file with the State Treasurer a surety bond as prescribed by the laws of Arizona relating to building and loan associations. The bond was approved by the Superintendent of Banks. Following the bond at all times notes and mortgages were in the possession of the State Treasurer and at all times such notes and mortgages were approved by the Superintendent of Banks. (714 and 94)

Association transacted a business, held itself out

as a building and loan association; it was examined as such at least twice by the Superintendent of Banks, (298-375) phase after phase of its business was examined into. It made reports to the Superintendent of Banks, seven in all, as a building and loan association. (378-470) The Superintendent of Banks issued one permit or license after another to Association as a building and loan association. (87-88)

In view of all of the foregoing, none of which can be disputed, we earnestly urge upon this court that the determination of the proper state officials as to the character of Association is conclusive upon this court. This principle is suggested in the Arizona case of Deatsch vs. Fairfield, 27 Ariz. 387 (233 Pac. 887) at pages 404-407. The Corporation Commission was not permitted to accept and file Articles of Incorporation other than of a building and loan association having such a name. Before it did so, it obtained the approval of the Superintendent of Banks after an investigation.

The communication of the Superintendent of Banks (724) shows that he decided, in his quasi judicial capacity, that Association had complied with the Arizona law relating to building and loan associations. He likewise, upon each successive issue of permit or license, so decided and his acts of examination of Association, as a building and loan association, were a like decision, as was also each of the several calls made by him upon it for

a report under the Arizona law relating to the duties of a building and loan association.

This phase of the question should not be passed without emphasizing that the original intervening petitioning creditors first swore in their involuntary petition that Association was a building and loan association (14). At that time possibly a building and loan association was subject to be adjudged a bankrupt. Following the amendment of the Bankruptcy Act to exclude building and loan associations on February 11, 1932, then for the first time counsel and their clients took the position that Association was an ordinary corporation incorporated under the general corporation laws of Arizona (49). Of course, this was necessary to their purposes to have Association adjudged a bankrupt.

In the recent case of Clemons vs. Liberty Savings and Real Estate Corporation, decided November 1, 1932, by the Circuit Court of Appeals for the Fifth Circuit, reported at 61 F. (2d) page 448, after discussing that ultra vires banking acts or building and loan acts could not determine the status of a corporation so as to exempt it from the Bankruptcy Act, the Court used this language:

> "It is evident that appellee was *organized* to do a general savings and loan business, something less than either a bank or a building and loan association. If it occasionally engaged in banking transactions, those acts were ultra vires and could not operate to make it a bank within the meaning of the bankruptcy law; nor

was it a building and loan association. *The status of a corporation is fixed by its charter.*"

When the District Court found as a fact that Association was organized under the general corporation laws of Arizona, and was not a building and loan association or a banking corporation, in our view of the situation, it wholly misconceived both the facts and the law in the case. It is for redress from such misconception of the law and facts that an appeal is prosecuted to this court.

We confidently urge, therefore, that the District Court erred as specified in Specification of Errors I and III.

II.

SPECIFICATION OF ERRORS II. THE UNITED STATES DISTRICT COURT ERRED IN NOT FINDING THAT ALL OR A PORTION OF THE BUSINESS TRANSACTED BY ASSOCIATION WAS THE BUSINESS OF A BANK OR THE BUSINESS OF A BUILDING AND LOAN ASSOCIATION.

The burden of proof rests upon intervening petitioning creditors. By every authority, a person petitioning to have a corporation adjudged a bankrupt has the burden of proof, not only that the corporation is a "moneyed, business or commercial corporation," but also that it is not in *any of the classes exempted by the bankruptcy act.* In re

Beisecker & Martin, 277 Fed. 1010; First National Bank of Bode vs. Williams (C. C. A.) 31 F. (2d) 749; Smith vs. Brownsville State Bank (C. C. A.) 15 F. (2d) 792; In re Macklem, 22 F. (2d) 426. Furthermore, the provision of the bankruptcy act enumerating the classes of corporations subject to the act *is to be strictly construed and includes only such corporations as are clearly within the enumeration.* In re New York & New Jersey Ice Lines, 147 Fed. 214.

We shall not undertake to detail the voluminous evidence covering the acts of this corporation. We will content ourselves with the major business transacted. We are of the earnest and sincere opinion that every act and transaction of Association was that of a building and loan business except possibly in this respect, and that is some loans made to non members, or perhaps some loans made upon inadequate security. Such loans to non members or on inadequate security, if of any consequence whatever, amount only to breach of duty and do not in any manner divest the Association of its building and loan character. Bankers may steal the money of the bank or misappropriate the money of the bank, but these acts where they are proven, do not divest the institution of its character as a bank.

It should be at all times remembered that the burden is not upon Association to show that it was doing a building and loan business, *but the burden*

is upon the intervening petitioning creditors to show that it was not doing a building and loan business or a banking business. Under any view of the evidence, in this they have wholly failed because some transactions of Association were undisputedly and unquestionably building and loan acts. Many of these we have already detailed in our Statement of Facts such as the articles of incorporation of the association, its declared purposes, the procuring of a permit from the Superintendent of Banks to operate as a building and loan association *and the several renewals of same;* the deposit of securities with the State Treasurer *and the substitution of the $50,000 surety bond for such securities.* These acts by statute and otherwise can only be acts of a building and loan association. To be added to these is the act of subjecting itself to the investigation and examination of the Superintendent of Banks. This could only be had as a bank or a building and loan association. It might well be said that the Corporation Commission, the State Treasurer and the Superintendent of Banks and their several employees, if Association was not a building and loan association or a bank, were embezzlers of the people's time devoted to subjecting this Association to the laws of the State of Arizona governing building and loan associations and exacting from it the fees the law provides for a building and loan association or a bank to pay.

The moneys that it obtained on pass book certificates and the other certificates were certainly

either a building and loan transaction or a banking transaction. No ordinary corporation in Arizona is permitted to so operate. They are peculiarly functions and privileges of a building and loan association or a bank. The record will be searched in vain for evidence showing the many loans made by the Association were not at least substantially all loans of a building and loan character and made substantially in accordance with the laws of the State of Arizona governing loans by building and loan associations. And again, if not building and loan transactions, the many loans were banking transactions. Who is it under the laws of the State of Arizona or generally speaking under the laws of any of the states that may receive deposits of money other than a banking corporation or a building and loan association. Certainly no ordinary corporation in Arizona is permitted to receive deposits. We shall hereafter refer to the recognized right of a building and loan association to receive deposits. Chapter 40, 1931 Arizona Session Laws.

It makes no difference whether all of the acts of the Association were building and loan or banking acts or not. It makes no difference if even the principal business is neither building and loan association nor banking business. If the Association transacted any building and loan business or any banking business under its articles of incorporation, it is excepted from the operation of the Bankruptcy Act. It is probably also true that since the Asso-

ciation was incorporated as a building and loan association, it would be unimportant if it never in fact transacted any building and loan business since the amendment to Section 4 of the Bankruptcy Act of July 1, 1898 on June 25, 1910. 36 Stat. 838, 839. Gamble vs. Daniel decided by the Eighth Circuit Court of Appeals March 14, 1930, 39 F. (2d) 447. In all earnestness, however, we contend that if Association performed any building and loan association business or any banking business, it is excepted from the operation of the Bankruptcy Act. In support of this contention, we first desire to call attention to the various changes in the Bankruptcy Law.

The part of the Bankruptcy Act referring to involuntary bankruptcy was originally enacted as follows:

> "Any natural person, except a wage-earner of a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and corporation *engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits,* owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. Private bankers, but not national banks or banks incorporated under the State or Territorial laws, may be adjudged involuntary bankrupts."

and remained in that form until amended by act of June 25, 1910.

In 1910, it was amended to read as follows:

> "Any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and *any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation*, owing debts to the amount of $1,000 or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this title."

On February 11, 1932, the act was further amended by adding the words, "or a building and loan association" after the words "banking corporation" in the exceptions.

In reading the authorities, attention should be paid to the wording of the act at the time the decision was rendered. Keeping in mind well known rules of statutory construction, particularly the rule that legislative interpretation of a statute is always persuasive to a court, and the further rule that if a legislative body, in amending an act, omits or adds words, the same is presumed to have a purpose, we do not believe it takes any review of authorities to determine that Congress, in amending the statute, intended to except building and loan *associations*, no matter what other business they may transact, and no matter of the legality of its acts.

The District Court apparently adopted the view

to the effect that the bankruptcy court will be guided by the *principal business* conducted by the corporation. There are authorities to be cited so holding. They will be found, however, to have arisen under the law as originally enacted.

It is to be noted that in the original law Congress provided for involuntary bankruptcy of corporations *engaged principally* in manufacturing, etc. *pursuits*, and did not have the exceptions as now contained in the statute. The original act did not make the nature and character of the corporation the determinative factor, but the business or pursuit in which the corporation was engaged.

In 1910, in amending the act, Congress pointedly omitted the words "engaged principally," and very pointedly omitted the word "pursuits." The 1910 amendment, insofar as corporations are concerned, provides that *any moneyed*, etc. corporation —not a corporation principally engaged in some pursuit—is subject to the act, and excepts "a municipal, railroad, insurance, or banking corporation" (not a corporation *engaged principally* in banking, etc.); and yet as to natural persons the 1910 amendment retains the words "except . . a person *engaged chiefly* in farming."

In the case of Gamble vs. Daniels, supra, page 450, the court in speaking of the purpose and effect of this 1910 amendment, said:

"It was to escape the confusion and uncer-

> tainty that the amendment 'adopted the scientific way of declaring a class and then stating exceptions to the class.' Cong. Rec. Vol. 45, page 2275. We have no doubt that when Congress used the words 'banking corporation' it meant corporations which were authorized by the *laws of their creation* to do a banking business."

The 1932 amendment added a building and loan *association*—not a corporation *engaged principally* in building and loan business — to the excepted corporations. It is apparent from every known rule of construction that Congress, in amending this law, intended to have no quibbling as to the business which a corporation may engage in, or *principally* engage in, and if it was organized and qualified as a bank, or organized and qualified as a building and loan *association, such it is*, no matter if it actually engages in other pursuits.

For such reason we contend that we should not be put to a discussion as to what business this association was principally engaged in. It was organized as a building and loan association, qualified as such, was granted a permit by the Superintendent of Banks to operate as a building and loan association, and at least insofar as the officers' intentions were concerned, did operate as a building and loan association and subject itself to annoying and expensive investigations and examinations by the Superintendent of Banks, which undobutedly they would not have done if they did not believe they were a building and loan association. In other

words, we have a corporation recognized by all state officials—the Corporation Commission, Superintendent of Banks, State Treasurer—as a building and loan association, and doing a building and loan business, and subject to all regulations of the state of Arizona concerning building and loan associations, and the officers and managers of the corporation themselves believing and thinking they were conducting a building and loan business, yet the intervening petitioning creditors, because of some business carried on by the Association, which they say was not building and loan, desire the Court to weigh the evidence and determine the *principal* business of the Association. We assert, under the Bankruptcy Act as amended, such is not the province of the Court.

We are not without authority to support our position but on the contrary we assert that the only case directly in point in principal or fact is the case of In re Humphrey Advertising Company (C. C. A. 7th C.) 177 Fed. 187. This case has not been criticized or overruled and we believe this exact situation has not, since the Humphrey case, been before any appellate court for consideration. No decision is cited as late as April, 1933, in Shepard's Federal Citations thereon.

The Arizona laws are similar to those of Illinois where the case under discussion arose in that corporations can engage in more than one business. We quote from the opinion at page 188:

"Consequently, it happens that a corporation may carry on two distinct and independent lines of business, one of which may prosper, while the other languishes; or, both having become insolvent, one may be within the provisions of the bankruptcy act, and the other without the act . . . . .

It cannot be that, as between two separate lines of business, one within, and the other without, the act, and both included in the charter, it is the duty of the bankruptcy court to *weigh, measure, estimate, balance, and compare the one with the other with a view to ascertaining the relative importance of the several classes of business* embraced within the specifically declared objects of the corporation and actually carried on by it, in the absence of clear statutory authority — bearing in mind the strictness with which this section of the act should be construed. In re Empire Metallic Bedstead Company, 98 Fed. 981, 39 C. C. A. 372 . . . . . .

Assuming, as insisted by appellant, that the other branch of appellee's corporate objects does come within the act, there existed two distinct classes of business in which appellee was engaged, neither of which can be termed its principal business, and both of which stood on the same footing for the purpose of ascertaining what was the principal business of appellee. If the court should assume to decide that one or the other is the business in which the corporation is principally engaged, it could not find that the rejected line of business is incidental thereto, for it is not. The case is novel, and one of first impression, growing out of the language of the Illinois statute. We are of the

> opinion that the facts of the case create a situation not within the bankruptcy act, for the reasons stated."

Upon this authority is this court not bound to declare Association with the excepted corporations?

However, even if the Court undertakes to weigh the importance of the alleged various businesses conducted by this Association, we earnestly contend the final result of a careful examination of the testimony must be the conclusion that not only its principal, but all of its business, was that of a building and loan association. The definition in the statute of the state of Arizona of building and loan associations is, "organizations having for their object accumulation by the members of their money by periodical payments into the treasury thereof, to be invested, from time to time, in loans to the members upon real estate for home purposes."

This Association did accumulate money by periodical payments into the treasury, and did invest it, from time to time, in loans upon real estate. Counsel for intervening petitioning creditors in the District Court said that the greater proportion of the alleged bankrupt's money was accumulated from the sale of certificates which bore interest, and some of which were fully paid at the time of the sale, and others were payable in installments or, in the words of the statute, "periodical payments into the treasury" were made thereon; and also by the receipt of deposit from various persons from

time to time for which so-called passbook certificates were issued. Counsel stated that there is no authority in the statute governing building and loan associations for the accumulation of money in that manner. We believe that counsel also must admit that there is no prohibition against accumulation of money in such manner. The statute does not say that you shall not issue and sell investment certificates, and does not say you shall not receive deposits and issue passbook certificates therefor. It does not define the word "accumulation," nor the method of accumulation; it does not define the word "members," nor who are members; and it does not define "periodical payments." Counsel for creditors insisted in the District Court that a building and loan association has to be in the nature of a *mutual* company or association. We believe they must come to that conclusion from a study of the original history of building and loan associations. Originally, building and loan associations were mutual, but also, so were insurance companies and many other forms of associations which are now recognized as legitimate stock companies. You cannot gather from Chapter 76 of the 1925 Arizona Session Laws or the 1928 Code that building and loan associations must be mutual, because Section 613 of the 1928 Code provides that the articles of incorporation shall name *the amount of par value* and *the kinds of stock* that the association will issue. That certainly contemplates regular stock companies and possibly a combination of several different kinds of capital stock. At any

rate, the legislature of the state of Arizona has definitely settled the matter with an amendment of Section 621 of the 1928 Code, referring to withdrawal of a shareholder of a building and loan association, such amendment being Chapter 40 of the 1931 Session Laws of Arizona. In fact this amendment answers practically every contention made by the creditors in the District Court and that can be made in this court. When a legislature, in amending a law, interprets or construes such law, such an interpretation and construction is persuasive to and binding upon a court, unless such subsequent interpretation is violative of the plain wording of the original law. II Lewis Sutherland Statutory Construction, page 886; First National Bank v. Missouri, 263 U. S. 640.

Keeping in mind that the article in the 1928 Code concerning building and loan associations does not prescribe that a corporation must be mutual, or define exactly in what manner or method moneys shall be accumulated or what evidences of payments by subscribers shall be issued, or define the word "members" except by implying that "shareholders" are members, and in turn apparently providing for any number of classes of shareholders (in fact, the 1928 Code, as to the matters above mentioned, is ambiguous and indefinite), we read the 1931 amendment above referred to. It commences, "Any shareholder whose stock is not delinquent and has not been declared forfeited. . . . " may withdraw such stock on certain terms and con-

ditions and receive certain payments therefor. The last part of the amendment reads as follows:

> "It is expressly provided, however, that where the building and loan association *is not strictly a mutual company but is in effect and actually a stock company the certificate holders, or subscribers to certificates, or depositors, irrespective of designation,* whose payments are not delinquent and have not been declared forfeited, shall have the right at any time after the date of initial payment of withdrawing all sums paid by them excepting two and one-half per cent of maturity value of the *certificate.* After one year from the date of initial payment such *depositors* shall be entitled to withdraw the full amount by them *deposited,* excepting two and and one-half per cent of the maturity value of the certificate, plus interest for the full time at the rate specified in the contract; provided however, that interest shall be paid up to the last annual or semi-annual interest paying date. It is also further provided that thirty days notice of intent to withdraw shall be given by the *depositor* or *certificate holder* to the company. Not more, however, than one-half of the monthly installments received by such association for any month shall be used during that month to pay withdrawals, without the consent of the board of directors."

Therefore, the legislature of the state of Arizona which enacted the 1928 Code, and also the 1931 amendment, in said amendment construes and interprets the 1928 act as permitting and allowing building and loan associations to: (1) to be stock

companies and not mutual; (2) to issue certificates and have certificate holders; (3) to receive deposits. And furthermore, the legislature apparently recognizes that certificate holders and depositors are "shareholders" because the amendment is entitled "WITHDRAWAL OF SHAREHOLDER" and provides that where a building and loan association is a "stock company" not mutual, "certificate holders, or subscribers to certificates, or depositors, *irrespective of designation*, whose payments are not delinquent . . . . . " may withdraw the same under terms and conditions comparable with those provided for shareholders in a mutual company. The statute clearly contemplates mutual and stock companies, but for mutual companies the members are evidently designated "shareholders," and in stock companies the members may be "certificate holders," "subscribers to certificates," or "depositors." Thus we find every possible contention in this case completely answered by statute; first, a building and loan association is properly organized as a stock company; second, a building and loan association can accumulate moneys by means of investment certificates or by receiving deposits; third, certificate holders and depositors are *members* of a building and loan association, no matter whether designated so by law or not.

Therefore, this Association, in having "certificate holders" and "depositors" strictly and technically complied with the statute in accumulating moneys.

In the court below, about the only other acts complained of by intervening petitioning creditors as being non building and loan acts are loans made by the Association. It was contended in the court below that loans by the Association were not made to members as provided by statute. The evidence discloses that many loans were made to members, that is certificate holders and depositors, also the evidence discloses that some loans were made to non members.

In the first place, loans are only a part of the business of a building and loan association. The 1925 Session Laws, Chapter 76 and the 1928 Code do contemplate that upon a loan being made by a building and loan association, the borrowers should subscribe for certificates or other forms of membership to the amount of the loan, and such subscribed membership shall be held as additional security. Suppose such is not done—what is the effect? Is the loan invalid? Certainly not. The borrower could not set up a failure to subscribe to membership as a defense to a note or foreclosure of a mortgage. The remedy for such a failure, if anyone has been damaged thereby, is either to compel the borrower to subscribe to the required membership, or possibly a suit against some officer. The fact that loans were made without compelling a subscription certainly will not deprive a corporation of its character as a building and loan association. For illustration, the statutes of the state of Arizona provide that a savings bank shall loan its

money only on first mortgages upon real property, or invest in bonds of the state, county, etc. Suppose any savings bank loaned fifty per cent of its deposits upon *second* mortgages, and with the other fifty per cent purchased Corporation stock, all in violation of the statute. May it be said that such acts deprived it of its character as a bank? Certainly not. Our banking laws provide that banks shall not loan to any officer or director an amount in excess of the equivalent of ten per cent of its capital stock and surplus, and further provide that a loan to any one individual, other than an officer or director, shall not at any time exceed the equivalent of fifteen per cent of its capital stock and surplus. Suppose that a bank violates each and all of these provisions, which we well know has been done, yet it is not deprived of its character as a bank. It is still doing a banking business. The remedy is against the defaulting officers.

Suppose some loans made by the Association were excessive. This has nothing to do with the character of the Association. It is not determinative of whether it is a building and loan association. The statute provides that appraisals should be made by *three members of the Association* and such appraisement by such members will determine the amount to be loaned. No evidence whatever appears in the record that there was not an appraisement made by three members of the association in connection with each loan. Assume that three members acted fraud-

ulently in making appraisals. Such fraudulent act might create a liability on those making the loans. It would have no determinative effect as to the character and status of the Association.

We trust the foregoing will persuade the court that the business transacted by Association was all building and loan business, but if not all building and loan business, that the principal business or some business was building and loan business. However, if Association is not a building and loan association, it must be a bank.

It is our view that Association is a building and loan association. However, its articles of incorporation contain all that would be necessary to constitute it a savings bank under the laws of Arizona. In its articles it refers, as before noted, to Chapter 31 Arizona Session Laws 1922. It is our idea that reference was made to this chapter by reason of Sections 9 and 10 thereof, which we quote as follows:

> "Section 9. Institutions Subject to Examinations. All banks organized under the laws of this State, all loan and trust companies receiving deposits, and all building and loan associations organized and doing business within this State, shall be subject to examination by the Superintendent of Banks or Examiner.
>
> Section 10. Duties of Superintendent of Banks and Examiner. The Superintendent of Banks, or the Examiner, shall visit and examine every savings bank at least once in each year, and every bank other than savings banks,

> and every building and loan association, at least twice in each year. At every such examination careful inquiry shall be made as to the condition and resources of the institution, the mode of conducting and managing its affairs, the official action of its directors, the investments and disposition of its funds; whether or not it is violating any of the provisions of law relating to banking corporations and banks, and as to such other matter as the Superintendent of Banks may prescribe."

It may be, however, that the organizers of Association, in addition to having in mind a building and loan association, also had in mind a savings bank, and this may be the reason for the reference contained in the articles. That such may be the case is strengthened by the reference to Chapter 11 of the 1923 Arizona Session Laws which is an amendment of Section 3 of Chapter 31 of the 1922 Arizona Session Laws only relating to the appointment of a Superintendent of Banks. It would take a herculean effort to hurdle over the fact that Association is a building and loan association, and in so doing one must land in a banking corporation.

If it can be said that the Association, in accepting deposits and in issuing investment certificates or certificates of indebtedness, was not doing a building and loan business, then it must have been doing a banking business. There is no corporation authorized to receive such deposits and to issue such certificates except a building and loan association or a banking corporation.

Section 1, 16 and 17 of Chapter 31 of the 1922 Arizona Session Laws read:

"Section 1. Construction. All the general powers and privileges, as well as the general restrictions and limitations provided in this Chapter, and applied to the corporations to be organized under and regulated by this Chapter, by the general designation of banks, shall be understood and construed to include commercial banks, savings banks, those combining both branches of business and trust companies.

Section 16. Commercial Bank Defined. The term commercial bank, when used in this Chapter, means any bank authorized by law to receive deposits of money, deal in commercial paper, or to make loans thereon, and to lend money on real or personal property, and to discount bills, notes, or other commercial paper, and to buy and sell securities, gold and silver bullion or foreign currency or bills of exchange.

Section 17. Savings Bank Defined. The term savings bank, when used in this Chapter, means a bank organized for the purpose of accumulating and loaning its funds; receiving deposits of money; loaning, investing, and collecting the same with interest and repaying depositors with or without interest and having power to invest said funds in such property, securities, and obligations, as may be prescribed by its board of directors, and to pay a stipulated rate of interest on deposits made for a stated period or upon special bonds."

These three sections are now found as Section 209 of the Revised Code of Arizona 1928.

From the definitions contained in the foregoing quoted sections of the Session Laws of 1922, it is to be readily seen that the articles of incorporation of the Association bring it within the terms of said statute. In other words, Association could carry on a banking business without such business being ultra vires, whereas any business other than that of a building and loan association or a banking business would, in all probability, be beyond the charter authority of the Association and ultra vires.

A like question was raised in the case of Rossi v. Hammons, 34 Ariz. 95, 268 Pac. 181. The Arizona Building and Loan Association sold $5000.00 of its fixed and permanent capital stock to Rossi, and later some officers of the corporation without any authority of the board of directors, and in direct violation of a provision of the by-laws, repurchased such stock. Upon the association becoming insolvent, a receiver was appointed by said court, and such receiver brought suit for the recovery of the $5000.00; and the defendant demurred upon the ground that the receiver was not a proper party, but that under the statute the Superintendent of Banks was the only person entitled to liquidate a building and loan association. The demurrer was sustained, and thereafter the Superintendent of Banks took over the liquidation of the association and brought suit. The defendant again demurred, but this time on the

ground that under the statute, while the Superintendent of Banks had the power of investigation and examination of building and loan associations, he had no authority to liquidate them. The demurrer was overruled, and in the Supreme Court the appellee, Superintendent of Banks, took two positions: one, that the building and loan association under the purposes stated in its charter, could, in fact, carry on a savings bank business and therefore was subject to liquidation as a savings bank under the banking code; secondly, that the appellant by demurring to the action brought by the receiver appointed by the court who was, in fact, a proper party, invited the error of the action being brought by the Superintendent of Banks. On the second point the court sustained the judgment of the lower court, but held the first point not well taken. The court said:

> "Appellee takes the position that, due to certain clauses in its articles of incorporation, the Arizona Building & Loan Association was permitted to carry on the business of a savings bank and for this reason should have been held to be one, but it is unnecessary to determine whether this is true or not for the reason that if it had this right under its charter this fact alone would not be sufficient to make it a savings bank when the primary purpose of its organization was to carry on the business of a building and loan association. Before such a result could follow it would be necessary to show that it actually transacted business of this character *or held itself out as doing so.* And while it is true that a building and loan asso-

> ciation, *which actually holds 'itself out to the public as receiving money on deposit, whether evidenced by certificate, promissory note, or otherwise,'* (Section 54 Banking Code), *even in the absence of charter permission to transact such business, may be considered as carrying it on anyway and, therefore, as subject to the liquidation as well as other provisions of the Banking Act*, yet in view of the fact that the record in this case is free from even suggesting that this association either did a business of this kind or held itself out as doing it, this section of the banking act is wholly without application and furnishes no basis for holding the association to be a savings bank."

If the rule prior to the 1910 amendment of the Bankruptcy Act that it is the business actually done, not what a corporation's charter permits, which determines the question of whether or not it is exempt from the operation of the Bankruptcy Act, should be applied, and if the acceptance of deposits and the sale of certificates be not the transacting of a building and loan business, then those transactions were banking transactions and Association must be held to be principally engaged in the banking business, a business not ultra vires under its charter. Whether it be a building and loan association or a banking corporation it is exempted from the operation of the Bankruptcy Act and the involuntary petitions should have been dismissed. The proof offered by petitioners falls far short of sustaining the burden of proof cast upon them.

III.

SPECIFICATION OF ERRORS IV. THE DECREE OF THE UNITED STATES DISTRICT COURT (182-192) IS ERRONEOUS IN THAT IT ADJUDGED ASSOCIATION A BANKRUPT AND IN THAT IT DID NOT DISMISS THE INVOLUNTARY PETITIONS. THE UNITED STATES DISTRICT COURT ERRED IN ADJUDGING ASSOCIATION A BANKRUPT AND IN NOT DISMISSING THE INVOLUNTARY PETITIONS.

What we have said in our argument under all other specifications demonstrates the errors complained of in this specification. We shall not repeat the argument.

We urge, in addition to the arguments heretofore presented, under all other specifications, that the United States District Court erred in not dismissing the involuntary petitions, because, when motions to dismiss the original creditors' amended involuntary petition and intervening creditors' involuntary petition filed January 21, 1932, were heard, both said petitions showed upon their face that Association was a building and loan association and, therefore, that the District Court was without jurisdiction to adjudge Association bankrupt.

Norris vs. Crocker, 14 L. Ed., 210, 13 Howard 429;

The Merchants Insurance Co. vs. Ritchie, 18 L. Ed. 540, 72 U. S. 541.

The District Court properly could only have dismissed said petitions or determined that the court had jurisdiction. What the court did, as shown by the order under date of February 13, 1932 (37-40), was to permit original and intervening creditors to file an amended petition within ten days from that date, which would give the District Court jurisdiction or as the court said: "Show the jurisdiction of this court" (39).

The District Court did not have jurisdiction conferred upon it by the amendment of the original intervening creditors' petition which said original petition showed the court not to have jurisdiction. Other later interventions and the filing of involuntary petitions could add nothing to the jurisdiction of the court, which was invoked by the earlier petitions. We have then the situation of the District Court having proceeded without any jurisdiction attempting to authorize an amendment of an involuntary petition to confer jurisdiction. All the court had power to do was to dismiss the then pending involuntary petitions. Petitioners or other creditors might have thereafter filed a new involuntary petition. This was not done. They could not intervene in a proceeding in which the court was without jurisdiction and by allegations in amended petitions or original intervening petitions confer a jurisdiction which did not exist at the time motions to dismiss were seasonably made and heard.

CONCLUSIONS

Summarized our contentions are:

1. That Association was a building and loan association and was conducting a building and loan association business throughout its existence.

2. That even if Association did not transact its business strictly according to statute governing building and loan associations, yet it was organized as such, recognized as such, was issued certificates and permits as such, was required to and did submit to all statutes and regulations governing building and loan associations and never pretended to operate as anything except a building and loan association, and, therefore, under the Bankruptcy Act, as amended in 1910, and in 1932, it was excepted from the corporations subject to be adjudged bankrupt.

3. That Association did unquestionably transact some building and loan business and since it transacted some building and loan business, it is excepted from the corporations that may be adjudged bankrupt and *it is not the province or right of the court to weigh the importance of that business as against other businesses which the Association may have been transacting.*

4. That according to the provisions of the Arizona statutes concerning building and loan associations and the interpretation and construction placed thereon by the Legislature by its amendment in 1931 (Chapter 40, 1931, Arizona Session Laws)

all or at least the principal transactions and business of Association were technically and distinctly building and loan business.

5. That the 1931 amendment of the Arizona Statute must be given full force and effect and if it may be said that such amendment is not a legislative interpretation and construction of the statutory provisions theretofore existing, then we urge that it was a new building and loan law effective of the date of its passage and approval. Several months before the alleged act of bankruptcy in November, 1931. Even if it could be successfully argued that Association was not doing a strict and technical building and loan business before the effective date of said 1931 amendment, we urge *that it was thereafter and at the time of the alleged act of bankruptcy and the filing of involuntary petitions in bankruptcy.*

6. That if intervening petitioning creditors have sustained the burden of establishing that Association is not a building and loan association, *it is our then contention that such creditors have established that the Association is a banking corporation.*

7. That the United States District Court had no jurisdiction to allow intervening creditors to amend their petition, which in its original form showed the court to have no jurisdiction. That all the District Court had power to do was to dismiss the petition. That subsequent interventions and the filing of

amended and new involuntary petitions in the same cause did not confer jurisdiction upon the court. That creditors could have filed a new petition in a new proceeding, but not having done so, the pending involuntary petitions should be dismissed.

We, therefore, respectfully submit that the decree of the United States District Court should be reversed and the involuntary petitions dismissed.

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APPENDIX

AN ACT

TO PROVIDE FOR THE ORGANIZATION OF BUILDING AND LOAN ASSOCIATIONS; REGULATING AND DEFINING THE DUTIES AND OBLIGATIONS OF THE MEMBERS, DIRECTORS AND OFFICERS OF SAID ASSOCIATIONS; PRESCRIBING THE POWER OF THE SUPERINTENDENT OF BANKS OVER SAID ASSOCIATIONS; PROHIBITING THE DOING OF BUSINESS BY ANY COMPANY NOT QUALIFYING UNDER THIS ACT AND PRESCRIBING A PENALTY FOR THE VIOLATION THEREOF; AND REPEALING ALL ACTS AND PARTS OF ACTS IN CONFLICT WITH THE PROVISIONS OF THIS ACT.

Be It Enacted by the Legislature of the State of Arizona:

Section 1. This act shall be known as the building and loan subdivision of the Banking Code. Building and Loan Associations are defined hereby to be corporations, societies, organizations or associations having for their object the accumulation by the members of their money by periodical payments into the treasury thereof, to be invested, from time to time in loans to the members upon real estate for home purposes.

Section 2. Whenever any number of persons, not less than five, shall desire to incorporate a building and loan association, they shall make and file articles of incorporation with the Corporation Commission as provided for the organization of private corporations, which shall include the following:

1. The name of the association. The name shall not be the same as, nor too closely resemble, that in use by any existing corporation established under the laws of this state. The words "building and loan association" shall form a part of the name and no corporation not organized under this act shall be entitled to use a name embodying either said combination of words; provided, that associations now existing may continue their present names;

2. The principal office, or place of business of the association which shall be within this state;

3. The amount of the par value and the kinds of stock that the association will issue;

4. The time of its duration;

5. A provision that such association is organized under this act for the purposes herein expressed;

6. The names and residences of the persons who shall make, subscribe, and acknowledge the said declaration, a majority of whom shall be citizens of this state, and who shall thereafter be called incorporators.

Section 3. Before the completion of the organization of said company, application must be made to the Superintendent of Banks for permission to carry on the business of a building and loan association. Such application must state the necessity for such an association

and full information respecting the proposed organization. The Superintendent of Banks may require a public hearing or may investigate with his Bank Examiners the application and if satisfied that the incorporators are financially responsible and that there is need in the community for the organization of a building and loan association, shall issue a permit to organize such a company and to carry on such business. The association making such application shall pay to the Superintendent of Banks fifty dollars or so much in excess thereof as may be necessary to cover the costs of his investigation which sum shall not be returned in the event the application is denied. No appeal may be had from the decision of the Superintendent of Banks with respect to said application.

Section 4. The conduct and management of the affairs and business of such association shall be vested in a board of directors which shall consist of not less than five nor more than fifteen members. The corporators of the association shall serve as directors until the first meeting of the stockholders, to be held at the time provided for by this act, or until their successors are elected and qualified, after which the members shall be entitled to cast one vote for each director to be elected for each share in good standing in his or her name, cumulative voting shall be allowed. The directors unless it be otherwise provided by the by-laws of the association, shall elect or appoint all the other officers of the association not more than four of the officers of any such association incorporated under the laws of this

state shall be members of the board of directors of such association.

Section 5. The officers of the association shall record the certificate of permission to carry on business, in the office of the County Recorder of the County where the principal office is situated. The incorporators acting in the capacity of directors shall adopt appropriate by-laws to govern and prescribe the methods and the officers by whom the business of the association shall be conducted. The by-laws shall be in conformity with the provisions of this act and the laws of this state, and at all times during the regular hours of business shall be open to the inspection of the members at its principal place of business. The by-laws, among other things, shall especially provide for the character and methods of conducting the business of the association, with rules governing the admission of members, the classes of and sale of its shares, the amount of admission fee, the amount of and the periods when dues shall be paid by the members to the association, the disposition and investment of the funds of the association, including loans, the amount of premiums to be paid for and the rate of interest on loans; the charges of management; providing for the annual meeting of the shareholders of the association, for the election of directors and the appointment of the subordinate officers; for the adoption, ratification, and amendment of the by-laws; for the method of voting at such annual meeting, and for the periodical investigation of the business and condition of such association. Such by-laws shall be recorded in the office of the Coun-

ty Recorder of the County where the principal office of the association is situated.

Section 6. At least thirty days prior to any annual or special meeting of any such association, a notice stating the time and place of such meeting shall be deposited in the post-office at the headquarters of such association directed to each member at his address, as the same appears at the time on the books of the association, and when so deposited, postage prepaid, shall be deemed a legal and sufficient notice of any such meeting, provided, also, that notice shall be given by weekly publication in a daily newspaper having a general circulation in the county where the principal offices of the association are located, or in a weekly newspaper if there be no daily newspaper published in said county, for a period of not less than two weeks and there shall be attached to and accompany such notice any proposed amendment or amendments to the articles of incorporation or by-laws of such association, and a statement of any officer to be elected at such meeting. All members of such association shall be entitled to vote at such meetings in person or by proxy.

Section 7. The association shall only loan its money secured by a note and first mortgage on improved real estate or upon real estate to be improved under contract with the association, and said loan shall not exceed 60 per cent of the conservative market value of the improved real property. No mortgage loan shall be made except upon the report in writing of three appraisers who shall be members of such association, which report shall state the con-

servative value of the property to be mortgaged. Every borrower shall, at the time of procuring a loan, subscribe for an equal amount of stock in the association and the same together with the accumulation shall be held as further security for said loan. The directors in their discretion may also loan upon the security of the shares in the association to the amount of ninety per cent of their withdrawal value; and may loan upon or invest, an amount not greater than twenty per cent of the total assets of the association, in bonds of the United States and of the State of Arizona, counties, school districts and other municipalities, as well as local improvement districts, in said state.

Section 8. Any premium which has heretofore or which shall hereafter be taken for loans or fines imposed for the non-payment of dues, made by any association governed by this act, shall not be considered or treated as interest, nor render such association amenable to the laws relating to usury.

Section 9. The amount or sum which may be set apart as an expense fund, together with the amount which may be charged for membership fees, fines or penalties, shall be fixed by the state superintendent of banks. No such association, corporation or company shall assess as operating expense, either directly or indirectly, in excess of ten cents per month upon each share of its stock of a maturity valuation of one hundred dollars, or assess any fines for non-payment of monthly installments in excess of five cents per $100.00 share for the first month that the same shall be in arrear.

and five cents per month for each month thereafter, and no membership fee in excess of three dollars per $100.00 share shall be charged. The term "operating expenses" shall be deemed to include salaries, commissions, fees or other compensation to its directors, officers, attorneys, auditors, agents, clerks and all other employees, rent, advertising and the like, but shall not include taxes, assessments, repairs, insurance, admission or membership fees, commissions on sale of real estate or the placing of loans, interest paid or liable to be paid, proper legal charges for searching titles, or the preparation of legal papers, expenses of foreclosure suits, or other modified litigation, fees or charges imposed by statute for state license.

Section 10. Any shareholder whose stock is not delinquent and has not been declared forfeited in such association, and whose share or shares are not pledged upon a loan, may withdraw such share or shares from the association at any time after two years by giving at least sixty days' notice in writing to the secretary of his intention to do so; at the end of said sixty days the association shall pay to the members so withdrawing as follows: If said stock is not more than two years old, all amounts paid in by such members upon such stock, except the sums paid as membership fees and fines, and the amount of such payments set apart by said association as an expense fund, which expense fund, however, shall not exceed the amount fixed in this act. If said stock is more than two years old, the member upon such withdrawal shall receive, in addition to the amount above specified, at least

three-fourths of all profits standing to the credit of such shares; provided, that not more than one-half of the monthly installments received by such association for any month shall be used to pay withdrawals without consent of the board of directors.

Section 11. Any such association may purchase at any sale, public or private, any real estate upon which it may have a mortgage, judgment, lien, or other encumbrance, or in which it may have any interest, and may lease, sell, convey or mortgage the same at pleasure.

Section 12. Every association shall set aside from its earnings five per cent, to a reserve fund until such fund shall equal fifty per cent of the total liability of the association to its members.

Section 13. It shall be the duty of the Superintendent of Banks annually, commencing on the first day of September of each year, to examine every building and loan association doing business in this state to ascertain whether such associations have complied with the provisions of this act. For the purpose of such examination the Superintendent of Banks is hereby given the same rights, powers and privileges granted to the superintendent of banks in his examinations of state banks. Said Superintendent shall collect for each such examination the actual and necessary expense incident thereto.

Section 14. It shall be lawful for any minor above the age of eighteen to take and hold shares in such association; and for such association to pay to any minor any money which

may be due him, and his receipt therefor shall be valid, but no minor shall be eligible to hold office in said association.

Section 15. The treasurer and secretary, before entering upon their duties, shall give good and sufficient bonds for the faithful performance of the same and for the safe keeping of all money or property coming into their hands, and the same shall be approved by the board of directors. All such bonds shall be increased, or additional securities required by the board of directors, when the same become necessary to protect the interests of the association or its members, but no director shall be accepted as a surety on such bonds, and the directors shall be individually liable for loss to the association or members caused by their failure to comply with the provisions of this Section.

Section 16. No foreign corporation or any corporation organized under the laws of any other state, shall be admitted or allowed to transact the business of a building and loan association within this state or maintain an office in the state for the purpose of transacting such business. Provided nothing herein shall affect any contract heretofore made between any citizen of this State and any company organized under the law of any other state, which may be prohibited by this act from doing or continuing to do business in this state; and further provided that all funds so collected from such contract shall be invested in first mortgage loans on real estate situate in the State of Arizona or in bonds as provided

by this act and that such company may issue in connection with loans made as aforesaid, an amount of stock in such association as equal to the amount of the loan made.

Section 17. Any person, as agent or otherwise, who shall solicit investments or issue or deliver any certificate of stock in this state for or on account of any foreign building and loan corporation, company or association, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding two hundred dollars nor less than fifty dollars, or by imprisonment in a county jail not exceeding three months. No company shall use the name of Building and Loan Company unless complying with the provisions of this Act. Any person who may act as the agent for any company using the name of any such company shall be guilty of a misdemeanor, punishable as provided in this section.

Section 18. Before the Superintendent of Banks shall issue a permit to do business to any building and loan association, he shall rerequire that such association shall deposit with the State Treasurer of Arizona, territorial funding bonds, bonds of the State of Arizona, or interest-bearing valid bonds of any of the counties, cities, towns, municipalities, or school districts of the State, or interest-bearing promissory notes, secured by first mortgages upon improved real estate within the State of Arizona, to the total amount and sum of fifty thousand dollars, to be held in trust, for the benefit of the stockholders of said building and loan association; provided, that in lieu of de-

posit of the securities, above mentioned, or any of them which such association may be required to deposit with the State Treasurer, a bond may be deposited to the said amount of fifty thousand dollars, by any reliable surety company, authorized and qualified to do business within the State.

Each and every security or bond, authorized to be deposited with the State Treasurer under the provisions hereof, shall be first examined and approved by the Superintendent of Banks before acceptance of the same by the State Treasurer. At the time that such securities or bonds are deposited with the State Treasurer, the same must be accompanied by a declaration, executed by the officers of such building and loan association, under resolution of its board of directors, that such bond and securities shall be and remain in the hands of the State Treasurer, as security for the protection of the stockholders of such association; and all obligations or debts of said association, other than obligations to its stockholders, shall be subordinate and secondary to the rights of such stockholders, as against such securities and bonds, so deposited with the Treasurer. The State Treasurer must, upon receipt of such securities, forthwith deposit the same in the State Treasury in a package marked with the name of the association from whom received, together with the approval or approvals thereof of the Superintendent of Banks, where said securities must remain, as security for the stockholders of such association, to which they respectively belong; but so long as the association remains solvent, the State

Treasurer must permit such association to collect the interest or dividends on any and all interest bearing bonds or securities, so deposited, and such association may, from time to time, under supervision of the Superintendent of Banks, and with his approval withdraw any of said securities, upon depositing the value thereof, in money, or other bonds or securities of the same kind and value as those mentioned in this section, instead of those withdrawn. If any mortgage, or other security, shall be diminished by partial payments thereon, or upon the notes secured thereby, whereby the total amount of the securities, or mortgages, or bonds deposited as such security, shall at their then present worth fall below the aggregate sum of fifty thousand dollars, such deficit must be immediately supplied by the deposit of other bonds or securities in lieu thereof; provided, that any company which may, or may have, suffered its bonds or securities, deposited with the State Treasurer, to diminish by partial or entire payments without reporting such partial payments or diminutions to the Superintendent of Banks, or without immediately supplying other securities to make up the diminution caused, as aforesaid, then such corporation, or its successors, assigns, or trustees, shall be precluded from bringing or maintaining any action in any court of this State for the foreclosure of any such mortgages, or securities, or from bringing or maintaining any action for the possession of any such real estate in this state, as such association may have a mortgage or lien upon and shall be so precluded until such association shall have fully complied with the requirements of this section. The Superintendent of Banks shall keep and maintain in

his office a list of all such bonds or securities, of every building and loan association, which shall be open to the inspection of any stockholder of any such association, and the said Superintendent of Banks shall, at all times, keep up to date, with said list, a record of any withdrawals or changes relating thereto; and it shall be the duty of the Superintendent of Banks, at any time, when in his judgment the bonds or securities of any building and loan association shall become insufficient, for any cause, to maintain said security of fifty thousand dollars with the State Treasurer, to require such association to deposit additional securities to make up the full amount of said fifty thousand dollars. And in the event that such association shall, for any reason, fail to comply with such order of the Superintendent of Banks, within five days from the date of receipt of notice of such order, then the Superintendent of Banks may, in his discretion, revoke the permit and right of said association to do business within the State. All withdrawals of securities, and substitutions therefor, from the custody of the State Treasurer, as authorized in this section, shall be under, and in accordance with, the regulations prescribed by the Superintendent of Banks, not inconsistent herewith.

Section 19. All acts and parts of acts in conflict herewith are hereby repealed.

XVI

Chapter 14, Article 4, sections 612-628 inclusive, Revised Code of Arizona, 1928

Building and loan associations.

612. *Association defined.* Building and loan associations are organizations having for their object accumulation by the members of their money by periodical payments into the treasury thereof, to be invested, from time to time, in loans to the members upon real estate for home purposes.

613. *Incorporation; articles.* Any number of persons, not less than five, a majority of whom shall be citizens of this state, may incorporate a building and loan association. They shall make and file articles of incorporation as provided for the organization of private corporations, which shall include:

1. The name of the association, which shall not too closely resemble that in use by any existing corporation of this state; the words "building and loan association" shall form a part of the name, and no person, not organized hereunder, shall use a name embodying said combination of words, except associations now existing; 2. the principal office, or place of business of the association, which shall be within this state; 3. the amount of the par value and the kinds of stock that the association will issue; 4. the time of its duration; 5. a statement that such association is organized under this article for the purposes herein expressed; 6. the names and residences of the incorporators.

614. *Permit from superintendent of banks; application; hearing.* Before the completion

of the organization, application must be made to the superintendent of banks for permission to carry on the business of a building and loan association. The superintendent may require a public hearing or may investigate the application and if satisfied that the incorporators are financially responsible and that there is need in the community for the organization of a building and loan association, shall issue such a permit which shall be recorded in the office of the recorder of the county of its principal place of business. The association shall pay to the superintendent fifty dollars, or so much in excess thereof as will cover the costs of his investigation. The decision of the superintendent is conclusive.

615. *Directors to conduct business; election of.* The conduct of the business of such association shall be vested in a board of directors of not less than five nor more than fifteen members. The incorporators shall serve as directors until the first meeting of the members. The members shall be entitled to cast one vote for each share in good standing, for each director to be elected, and cumulative voting shall be allowed. Not more than four of the officers shall be members of the board of directors.

616. *By-laws.* The first board of directors shall adopt by-laws to prescribe the methods, and by what officers, the business of the association shall be conducted. The by-laws shall especially prescribe the methods of conducting the business; the rules governing the admission of members, the classes and sale of its shares, the amount of admission fee, the amount of and the periods when dues shall be paid by the mem-

bers; the investment of the funds of the association; the making of loans and the amount of premiums to be paid for and the rate of interest thereon; the charges of management; providing for the annual meeting of the shareholders and the method of voting; for the election of directors and the appointment of the subordinate officers; for the amendment of the by-laws; and for the periodical investigation of the business and condition of such association. Such by-laws shall be recorded in the recorder's office of the county where the principal office of the association is situated.

617. *Meeting of shareholders; notice.* At lease thirty days prior to any annual or special meeting, a notice stating the time and place of such meeting shall be deposited, postage prepaid, in the post office directed to each member at his address as the same appears on the books of the association; like notice shall also be given by publication in a daily newspaper having a general circulation in the county where the principal office of the association is located, once in each week for not less than two weeks. Such mailing and publishing is legal notice of such meeting. There shall be attached to and accompany such notice any proposed amendment or amendments to the articles of incorporation or the by-laws, and a statement of the officer to be elected at such meeting. Members may vote in person or by proxy.

618. *Investment of funds; loans; security.* The association may make loans only upon notes secured by first mortgage on improved real property, or real property to be improved under contract with the association. Such loans

shall not exceed sixty per cent of the conservative market value of the improved real property. No loan shall be made except upon the report in writing of three appraisers, who shall be members of such association, and who shall report the conservative value of the property to be mortgaged. Every borrower shall, at the time of procuring a loan, subscribe for an amount of stock in the association equal to the loan, and the same, together with the accumulation, shall be held as further security for said loan. The association may also loan upon the security of the shares in the association to the amount of ninety per cent of their withdrawal value; and may loan upon or invest, an amount not greater than twenty per cent of the total assets of the association, in bonds of the United States, the state of Arizona, counties, school districts and other municipalities, and of improvement districts, in said state.

619. *Premiums and fines.* Any premium taken for loans, or fines imposed for the nonpayment of dues, by any association organized hereunder shall not be considered as interest and are excepted from the laws relating to usury.

620. *Expense fund; limitation on fines and charges.* The amount which may be set apart as an expense fund, and the amount which may be charged for membership fees, fines or penalties, shall be fixed by the superintendent of banks. No association shall assess or charge as operating expense, directly or indirectly, in excess of ten cents per month upon each share of its stock of a maturity valuation of one hun-

dred dollars, or assess any fines for non-payment of monthly installments in excess of five cents per one hundred dollar share for each month that the same shall be in arrears, and no membership fee in excess of three dollars per one hundred dollars. "Operating expenses" include salaries or other compensation to its directors, officers and all other employees, rent. advertising and all incidental expenses, but shall not include taxes, assessments, repairs, insurance, commissions on sale of real property or the placing of loans, interest, legal charges for searching titles or the preparation of legal papers, expenses of foreclosures, or fees or charges imposed by statute.

621. *Withdrawal of shareholder.* Any shareholder whose stock is not delinquent and has not been declared forefeited, nor pledged upon a loan, may withdraw such stock from the association at any time after two years by giving at least sixty days' notice in writing to the secretary of his intention to do so; at the end of said sixty days the association shall pay to the member so withdrawing as follows: If said stock is not more than two years old, all amounts paid in upon such stock, except the membership fees and fines, and the amount of such payments set apart as an expense fund; if more than two years old, the member upon such withdrawal shall receive, in addition, at least three-fourths of all profits standing to the credit of such shares. Not more, however, than one-half of the monthly instalments received by such association for any month shall be used to pay withdrawals without consent of the board of directors.

622. *Purchase of property mortgaged.* The association may purchase at any sale, public or private, real property upon which it may have a mortgage, or other lien, or in which it may have any interest, and may lease, sell, convey or mortgage the same.

623. *Reserve fund.* Every association shall set aside from its earnings five per cent for a reserve fund, until such fund shall equal fifty per cent of the total liability of the association to its members.

624. *Minor may hold shares.* Any minor above the age of eighteen years may take and hold shares in such association; and the association may pay him any money due him, and his receipt therefor shall be valid. No minor shall be eligible to hold office in such associations.

625. *Bond of secretary and treasurer.* The treasurer and secretary before entering upon their duties, shall give good and sufficient bond for the faithful performance of the same and for the safe keeping of all property coming into their hands, which bonds shall be approved by the board of directors. Such bonds shall be increased, or additional securities required by the board, when it becomes necessary to protect the interests of the association or its members. No director shall be accepted as a surety on such bonds. The directors shall be individually liable for loss to the association or members caused by their failure to comply with this section.

626. *Foreign associations excluded.* No foreign corporation shall be admitted or allowed

to transact the business of a building and loan association within this state or maintain an office in the state; nothing herein, however, shall effect any contract heretofore made between any resident of this state and any foreign corporation, but all funds collected from such contracts shall be invested as required herein of domestic associations, and such foreign corporations may issue in connection with loans made under its contract an amount of its stock equal to the loan.

627. *Soliciting for foreign association prohibited; penalty.* Any person who shall solicit investments or issue or deliver any certificate of stock in this state for or on account of any foreign building and loan association, shall be guilty of a misdemeanor. No person shall use the name of building and loan company unless complying with the provisions of this article. Any such person using a name embodying any combination of the words "building and loan association," or acting as agent for such person, shall be guilty of a misdemeanor.

628. *Deposit of bonds with state treasurer.* Before the superintendent shall issue a permit to do business to any building and loan association, such association shall deposit with the the state treasurer securities of the character authorized for the investment of the funds of the association to the amount of fifty thousand dollars, to be held in trust, for the benefit of the stockholders or members of said association; or in lieu of the deposit of such securities, or part thereof, a bond in the amount of fifty thousand dollars, of a surety company qualified

to do business within the state, to be examined and approved by the superintendent of banks before acceptance by the state treasurer, and shall be and remain with the state treasurer. as security to and for the benefit of the stockholders and members of such association. The association may, while solvent, collect the interest or dividends on the securities, and may, with the approval of the superintendent substitute other like security or give bond therefor. The superintendent shall keep in his office a list of all such bonds or securities and of substitutions and changes, which shall be open to the inspection of any member of such association. The superintendent, when in his judgment the bonds or securities of any association have become insufficient to maintain said security of fifty thousand dollars, shall order such association to deposit additional securities, and if such association shall fail to comply with such order of the superintendent, within five days from the date of the receipt of such order, then the superintendent shall revoke the permit and right of said association to do business within the state.

Chapter 40, 1931 Session Laws of Arizona

AN ACT

TO AMEND SEC. 621, REVISED CODE, 1928, RELATING TO BUILDING AND LOAN ASSOCIATIONS AND WITHDRAWAL OF CERTICIFATE HOLDERS AND DEPOSITORS.

Be It Enacted by the Legislature of the State of Arizona:

Section 1. Sec. 621, Revised Code, 1928, is hereby amended to read as follows:

Sec. 621. WITHDRAWAL OF SHAREHOLDER. Any shareholder whose stock is not delinquent and has not been declared forfeited, nor pledged upon a loan, may withdraw such stock from the association at any time after one year by giving at least thirty days notice in writing to the secretary of his intention to do so; at the end of said thirty days the association shall pay to the member so withdrawing as follows: If said stock is not more than one year old, all amounts paid in upon such stock. except membership fees; if more than one year old, the member upon such withdrawal shall receive, in addition, at least three-fourths of all profits standing to the credit of such shares. Not more, however, than one-half of the monthly installments received by such association for any month shall be used to pay withdrawals without the consent of the board of directors. It is expressly provided, however, that where the building and loan association is not strictly a mutual company but is in effect and actually a stock company the certificate holders, or sub-

scribers to certificates, or depositors, irrespective of designation, whose payments are not delinquent and have not been declared forfeited, shall have the right at any time after the date of initial payment of withdrawing all sums paid by them excepting two and one-half per cent of maturity value of the certificate. After one year from the date of initial payment such depositors shall be entitled to withdraw the full amount by them deposited, excepting two and one-half per cent of the maturity value of the certificate, plus interest for the full time at the rate specified in the contract; provided, however, that interest shall be paid up to the last annual or semi-annual interest paying date. It is also further provided that thirty days notice of intent to withdraw shall be given by the depositor or certificate holder to the company. Not more, however, than one-half of the monthly installments received by such association for any month shall be used during that month to pay withdrawals, without the consent of the board of directors.

Section 2. All laws or parts of laws in conflict with the provisions of this act are hereby repealed.